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Supreme Court of the United States

OCTOBER TERM, 19~~60~~

No. ~~607~~ 42

PHIL CAMPBELL, COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, ET AL., APPELLANTS,

vs.

WILLIAM HUSSEY, JR., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

FILED JANUARY 31, 1961
PROBABLE JURISDICTION NOTED APRIL 3, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 687

PHIL CAMPBELL, COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, ET AL., APPELLANTS,

vs.

WILLIAM HUSSEY, JR., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

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[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SWAINSBORO DIVISION

No. 326

In Equity

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY, Complainants,

vs.

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and CECIL ATTAWAY, Defendants.

COMPLAINT—Filed July 30, 1960

Complainants show that complainants William Hussey, Jr., George C. Sugg, Ed Wiggins, Guy Sutton, Sr., and Mrs. L. B. Willoughby, are citizens of the State of North Carolina; and that the complainants Aulbert J. Brannen, Sr., Aulbert J. Brannen, Jr., and Robert B. Brannen, are citizens of the State of Georgia; and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

This action arises under the Constitution of the United States, Article I, Section 8, Paragraph 3; and the same will hereinafter more fully appear.

Complainants bring this action for injunctive relief under Title 28, Section 2284 of the United States Code Annotated, against loss and damage by violation of Article I, Section 8, Paragraph 3 of the Constitution of the United States.

1.

Complainants are the owners and/or operators of Tobacco Auction Warehouses in Swainsboro, Georgia and in Statesboro, Georgia.

2.

Defendant Phil Campbell is a resident of the State of Georgia and occupies the position of Commissioner of Agriculture for the State of Georgia. Defendant Cecil Attaway is residing in Swainsboro, Georgia and is the official of the [fol. 3] State Department of Agriculture of Georgia in charge of administering the unlawful acts hereinafter set forth in relation to the operation of the tobacco auction markets in the vicinity and area of Swainsboro and Statesboro, Georgia, and including those properties of your complainants.

3.

The auction sales of tobacco on the Statesboro and Swainsboro Tobacco Markets are a part of, in, and themselves constitute interstate commerce.

4.

Complainants show that they have invested approximately $750,000.00, for the construction and equipping of their tobacco auction warehouses on said markets, that same were designed and built for the purpose of holding auction sales of tobacco only and unless they can be operated for the purposes aforesaid that the buildings and equipment therein will become practically worthless.

5.

As will hereinafter be more fully shown, defendants illegal acts have damaged complainants and unless the defendants are enjoined and restrained from continuing the illegal acts, which are hereinafter more fully set forth, complainants occupation and investment will be destroyed and they will lose the profits they could expect to receive from operating said tobacco warehouses, and they will suffer irreparable damage.

6.

The General Assembly of Georgia passed an Act for the regulation of sales of Flu-Cured Tobacco which was approved on March 7, 1960, and designated Georgia Laws, 1960, Pages 214-227.

7.

In part, the purposes of said Act are as follows, to-wit: "to provide a means of identifying all types of flue-cured leaf tobacco sold in this State and a procedure connected [fol. 4] therewith; . . . to provide for records to be kept by licensee to show the origin and amount of tobacco sold by him and a procedure connected therewith; . . . to provide a means of identification of flue-cured leaf tobacco as to types sold in this State and a procedure connected therewith; . . . to provide for identification tags for use in marketing tobacco in this State; to prohibit the mixing of type 14 tobacco with any other type of tobacco and to prescribe a means for the sale of such mixed tobacco; . . . to provide for the duties of Commissioner of Agriculture in conjunction with the administration and enforcement of this Act; . . . to repeal an Act approved March 9, 1955 (Georgia Laws, 1955, Page 589), relating to the sale of flue-cured leaf tobacco."

8.

As set forth in Section 1 of said Act it is the intent of the General Assembly that the said Act "provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State;". Further the classification of tobacco is set forth in said Act as: "Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida and Alabama."

9.

Said Act further provides: "Section 13. (A) As an aid in providing positive identification of type 14 flue-cured leaf tobacco, it shall be the duty of each licensee to furnish white identification tags to each licensee to cause such white identification tags to be placed upon each sheet of type 14 tobacco received in his warehouse for sale by requiring that producers, at the time of the receipt of tobacco in the

warehouse submit proof of the origin of the tobacco to be sold. No licensee shall receive from any producer any tobacco for sale unless the licensee receives proof in the form of marketing cards, or other identification measures issued by the United States Department of Agriculture so [fol. 5] as to definitely establish the origin of the tobacco. The licensee shall cause to be placed upon each sheet of type 14 tobacco a white sheet ticket that shall remain upon the sheet of tobacco at all times after receipt in the warehouse until after the sale of the sheet of tobacco and shall cause such ticket to have a carbon copy of the same color that shall remain with the sheet of tobacco at all times subsequent to sale, as well as prior to the sale, that the tobacco remains in this State.

(B) Each licensee shall cause to be placed upon each sheet of other than type 14 tobacco received by him for sale, at the time of the receipt thereof, a colored identification tag of a color prescribed by the Commissioner that shall be attached to and shall remain in a conspicuous place at or near the top of the sheet of tobacco in such manner as to show to any person who desires to ascertain the type of tobacco offered for sale, or held for sale, that the tobacco is other than type 14. It shall be the duty of each licensee to ascertain at the time of the receipt of the tobacco to ascertain from producers or others the origin of the tobacco offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type.

(C) Each licensee receiving tobacco from persons other than producers for sale shall require that the origin of the tobacco be proven to his satisfaction so as to enable the licensee to properly identify the type of tobacco.

(D) Any licensee who shall indicate or permit to be indicated upon his premises any tobacco as type 14 when, in fact, such tobacco is not type 14 or any licensee who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment of not less than one year nor more than five years and shall be subject to a fine of not more than $5,000.00 or both such fine and imprisonment."

[fol. 6]

10.

Said Act further provides: "Section 13. (E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State."

11.

Complainants show that, pursuant to the foregoing Sections of said Act, the defendants are enforcing same against your complainants and against other owners and warehousemen similarly situated; that the effect of such enforcement has been and is at this time, the placing on tobacco originating in Georgia, Florida or Alabama a white identification tag to indicate that such tobacco is Type 14; that tobacco originating from North Carolina and South Carolina, while of the same grade, body, species and character, has been, pursuant to said Section, assigned a blue identification tag, which, under said Act, is compelled to be displayed on such tobacco before, during and after sale as long as same remains in the State of Georgia.

12.

Under existing Federal laws, a uniform system of grading, typing and classifying tobacco offered for sale in tobacco auction warehouses, has been established, and has many years' standing, thus assuring to tobacco producers, warehousemen, buyers, processors and consumers a recognized set of standards governing the product as to type, quality, prize structure and grade. Under the Federal laws just mentioned, official graders of the United States Department of Agriculture, grade each sheet or pile of tobacco immediately prior to its sale, so that said official grade may be established for the benefit of seller and buyer alike, immediately prior to the sale, thus affording fairness to both. This grade by said official grader of the United States [fol. 7] Department of Agriculture is made without respect to the geographical origin of the tobacco, which would be an

irrelevant factor in determining quality, grade and worth. The grade made by the official grader of the United States Department of Agriculture is, under Federal law, placed upon the identification tag on each pile of tobacco, prior to its being offered for sale. This grade, therefore, is known to the grower, the warehousemen and the buyer alike, at the time the tobacco is sold on the auction floor.

13.

Complainants show that the act of the State of Georgia complained of is arbitrary and discriminatory in that it undertakes to classify tobacco solely by geographical origin and without respect to grade, quality, character or worth. Further, that said Act has caused defendants to, and they are, impeding the free flow of interstate commerce in violation of the United States Constitution, Article I, Section 8, Paragraph 3, which empowers Congress alone, to regulate commerce among the several States.

14.

Your complainants show that for many years, approximately sixty per cent (60%) of the total tobacco sold on the Statesboro and Swainsboro tobacco markets was grown in North Carolina and South Carolina. Your complainants further show that they cannot operate their tobacco auction warehouses unless they can sell the tobacco brought to their warehouses by the tobacco growers of North Carolina and South Carolina.

15.

In preparation for the 1960 tobacco selling season, complainants have expended large sums of money to contact tobacco growers in North Carolina and South Carolina to promote the interest and welfare of complainants' tobacco warehouses by selling the tobacco from North and South Carolina, that complainants have employed bookkeepers, [fol. 8] office personnel, certified weighers, auctioneers and numerous other employees necessary for the operation of said warehouses.

16.

Complainants show that the 1960 tobacco selling season opened in Georgia on July 28, 1960, and that sales were held on that date and on the 29th of July following; that large quantities of tobacco from North Carolina, South Carolina and Georgia were exposed for sale on said days; that the tobacco from the several States mentioned was all graded immediately prior to sale in the manner aforesaid and that such grades were assigned by official graders of the United States Department of Agriculture without respect to geographical origin but based on the factors aforesaid as to grade, quality, body and worth, and therefore, of equal quality and so graded by the official graders of the United States Department of Agriculture; that, notwithstanding, the result of the sales on the two days mentioned, revealed a severe disparity in price offered or received for the tobacco from the Carolinas bearing the Blue identification tags mentioned by reason of geographical origin and that of Georgia tobacco bearing the White tags aforementioned; that said disparity, on the whole, was as much as $18.00 per hundred pounds in favor of the Georgia tobacco bearing White tags as required by the Act complained of, in spite of the fact that such Georgia tobacco bore the same official United States Government Grade as the Carolina tobaccos bearing said Blue tags; further, complainants show that vast quantities of the tobacco from the Carolinas, bearing the Blue tags aforementioned, did not receive competitive bids on the market at all, for any price whatever.

17.

Complainants show further, that, while said auction sales were in process in Statesboro and Swainsboro tobacco markets, that various representatives from radio stations in the Carolinas attended said sales and took electronic recordings of the proceedings at said sales, carried them back to the [fol. 9] Carolinas and broadcast these over the radios there, with the result that the farmers in the Carolinas have virtually stopped all shipments of Carolina tobacco into the Georgia market, because of the price disparity mentioned, and complainants have been informed by many of their

customers from Carolina, and who are of many years standing as such, that the Carolina growers and customers will not and cannot feasibly, ship more tobacco into the Georgia market unless and until the blue tags are no longer required on their tobacco and/or until their tobacco offered for sale on the Georgia market will have placed thereon identification tags identical to that used for Georgia tobacco and all traces of discrimination removed, connected in anyway with geographical origin of the tobacco product.

18.

Complainants show that by reason of the foregoing, the Georgia tobacco auction market in Statesboro and Swainsboro and as well in those other areas similarly situated, has become completely demoralized and that the Georgia customers, upon seeing that tobacco from the Carolinas which bears the identical and proper grade as their own, but which has suffered the disparity in prices, has left many Georgia customers with the feeling that they have no certainty they are receiving fair and proper prices for their own product and your complainants are burdened with inquiries from Georgia and Carolina customers alike as to whether the Georgia markets mentioned will even be operative during the rest of the 1960 selling season, and unless the complainants receive immediate relief, they expect to have to close the market because of the threatened and impending loss of some sixty per cent (60%) of their volume of legitimate trade and because of positive knowledge that they cannot survive as market places with the remaining small balance of approximately forty per cent (40%) of their expected trade, on account of high costs of overhead, operation and investment.

[fol. 10]

19.

Your complainants show that, unless they are afforded immediate preliminary injunctive relief, that they will suffer irreparable damage and loss; that complainants have absolutely no adequate remedy at law and that, while the granting of preliminary injunctive relief will be of assistance to complainants it will work no harm whatever to

defendants in this case, but complainants show that defendants (sic) nor the State of Georgia can be injured by such relief.

20.

Complainants are ready to furnish a bond in a penal sum to be set by the Court for any damages defendants may sustain by the improvident grant of the preliminary injunctive relief sought in this petition.

21.

Complainants show that, since the establishment of the tobacco auction markets in Georgia more than thirty years ago, there has never been a price disparity between tobacco from one State or another based on geographic origin until the 1960 season mentioned above; that the complainants allege and verily believe that the disparity and demoralized market mentioned are directly and solely attributable to the act complained of and the presence of blue tags on the tobacco from the Carolinas and the white tag placed upon Georgia tobacco; and that defendants will continue to enforce said Act, with a continuation of the conditions set forth herein, unless the defendants are restrained and enjoined by this Court from so doing.

22.

Complainants show that the provisions of the Act complained of and the enforcement thereof by the defendants have no reasonable relation to the maintenance of tobacco auction sales, and unreasonably discriminate against the owners of tobacco grown in North Carolina and South Carolina and offered for sale in Georgia, as aforesaid, and said [fol. 11] act denies complainants equal protection of law and deprives them of their property without due process of law, contrary to the 14th Amendment of the Constitution of the United States.

Wherefore, Complainants pray:

(1) That process issue requiring the defendants to be and appear at Court as directed to them and there answer the complaints contained herein as the law so directs;

(2) That defendants, their successors in Office, the agents and employees of each and both and all other acting for them, and they, acting by and through all other persons, be temporarily and permanently enjoined and restrained from enforcing those provisions of said Act as require a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State;

(3) That defendants, and both of them, and others acting for them, in like manner, be temporarily and permanently restrained and enjoined from leaving in circulation, from circulating, from dispensing, from disposing of, and from using any blue identification tags, showing the type of tobacco offered for sale on the Georgia Tobacco Markets as being a different type of tobacco than type 14 as defined by said Act; and from causing the same to be done by direct or indirect means;

(4) That defendants, both of them, their successors in office and all others acting for them, in like manner, be temporarily and permanently restrained and enjoined from doing or causing to be done any act or thing which in any would (sic) discriminate against tobacco or the owners thereof, or both, on the Georgia tobacco markets, by reason of the geographic origin of such tobacco;

[fol. 12] (5) That the provisions of the Act complained of be declared null, void and unconstitutional as being violative of Article I, Section 8, Paragraph 3 of the United States Constitution;

(6) That the provisions of the Act complained of be declared null, void and unconstitutional in that same deny complainants and others similarly situated, equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States;

(7) That the provisions of said Act which are complained of be declared null, void and unconstitutional as depriving complainants of their private property without due process, in violation of Section 1 of the 14th Amendment to the Constitution of the United States;

(8) That complainants be afforded such other and further relief as to the Court seems meet and proper.

Homer S. Durden, Jr., Swainsboro, Georgia; Darius N. Brown, Swainsboro, Georgia; Neville & Neville, By William J. Neville, Statesboro, Georgia, Attorneys for Complainants.

[fol. 13] *Duly sworn to by William Hussey, Jr., et al. Jurats omitted in printing.*

[fol. 14]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

PRELIMINARY RESTRAINING ORDER—July 30, 1960

The within and foregoing complaint and prayers thereto read and considered; let the same be filed.

It appearing to the Court from the verified petition in said matter that grade matters of public interest and the constitutionality of a State Statute are at issue, and it appearing further from the allegations of plaintiffs that they have no adequate remedy at law, and the Court taking cognizance of the fact that the Georgia tobacco market directly will affect, not only the economy of the several complainants, but ultimately the economy of the State and the welfare of its people, as well as the economy and welfare of people of other States and areas engaged in interstate commerce; and further, that the complainants will suffer immediate and irreparable injury, loss and damage unless a preliminary injunction is issued instanter, before notice can be served and a hearing heard thereof, as provided in Rule 65 of Federal Practice and Procedure (Federal Rules of Civil Procedure).

It appearing further that said complaint is being filed under Title 28, Section 2284 of the United States Code, and raises issues of the constitutionality of certain provisions of a Statute of the State of Georgia, complained of in said petition, as being violative of Article I, Section 8, Para- [fol. 15] graph 3, of the United States Constitution relating to the power of Congress to regulate commerce among the several States and violative of the 14th Amendment of the Constitution of the United States respecting equal protection of the law and depredation of complainants private property without due process of law, it therefore appears to the Court that these issues necessarily address themselves to a three Judge Court, the same to be appointed by the Chief Judge of the Fifth Circuit Court of Appeals as by law provided and heard in due course.

Pending a hearing and determination by the three Judge Court, as by law provided, it is ordered, considered and adjudged that, meanwhile, the defendants, their successors in office and all others acting for them and they, and each of them, acting by themselves or through others, are hereby temporarily restrained and enjoined from:

(1) From enforcing, by direct or indirect or other means, on the Georgia tobacco market, any method, plan or device which identifies or tends to identify tobacco offered for sale on Georgia Tobacco market as to its geographic origin and which, in any manner, differentiates between tobacco originating in Georgia, Florida or Alabama on the one hand and originating in North Carolina or South Carolina on the other hand; and from by any means whatever, tending to distinguish or differentiate between tobacco by reason of its geographic origin, irrespective of where the same might be.

Ordered further, that the Clerk of this Court, in the manner prescribed by law, serve or cause to be served upon the Governor of Georgia and upon the Attorney General of Georgia, each, a copy of the complaint and Order in this matter.

This Order is given upon condition plaintiffs give bond in the sum of $5,000.00 to pay defendants for all damages

and costs they sustain in the event plaintiffs do not prevail in this suit. This bond to be approved by Deputy Clerk of U. S. Court in Swainsboro.

Let the defendants be served forthwith with a copy of said complaint and of this Order by the Attorneys of Record of the complainants, or any one of them, by handing a copy of the same to them, the defendants.

So ordered, this 30th day of July, 1960, at 8:30 o'clock, p.m.

F. M. Scarlett, United States Judge.

[fol. 16] Acknowledgments of Service (omitted in printing).

[fol. 17] [File endorsement omitted]

In United States District Court

For the Southern District of Georgia

Swainsboro Division

[Title omitted]

Answer—Filed August 10, 1960

The defendants, Phil Campbell, as Commissioner of Agriculture of the State of Georgia, and Cecil Attaway, for answer to the complaint herein:

1.

Deny the allegation contained in the first unnumbered paragraph of the plaintiffs' complaint which reads " . . . and the matter in controversy exceeds, exclusive of interest and cost, the sum of $10,000.00.", and by way of affirmative defense, deny that any monetary sum is involved in the controversy. The complaint does not set forth any facts to warrant the conclusion, or pray for any monetary damages, and defendants deny the jurisdiction of the court in this action.

2.

Defendants admit the allegations of paragraph 1 of the plaintiffs' complaint.

3.

Defendants admit the allegation as to the residence of Phil Campbell and for answer thereto, defendants allege that Phil Campbell is a resident of Oconee County, Georgia, and is the duly elected and qualified Commissioner of Agriculture of the State of Georgia. Defendants deny the allegation as to the residence of Cecil Attaway, and for answer thereto, show that defendant, Cecil Attaway, [fol. 18] is a resident of Bleckley County, Georgia. Defendants allege that both defendant Phil Campbell and Cecil Attaway reside in the Middle District of Georgia. Defendants deny the remaining allegations of paragraph 2 of plaintiffs' complaint.

4.

Defendants admit the allegations of paragraph 3 of plaintiffs' complaint.

5.

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of plaintiffs' complaint.

6.

Defendants deny each and every allegation contained in paragraph 5 of plaintiffs' complaint.

7.

Defendants admit the allegations of paragraph 6 of plaintiffs' complaint.

8.

Defendants deny the allegation, as stated, in paragraph 7 of plaintiffs' complaint in that the quoted provisions of the Act are taken from the Title thereof, wherein the true

intent and purpose of the Act is set out in Section 1 thereof, which reads:

> "Section 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the pro- [fol. 19] visions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama."

9.

Defendants deny the allegations, as stated, in paragraph 8 of the complaint in that the quotations therefrom are taken out of context and the full meaning and purpose of the General Assembly of Georgia is set forth in Section 1 of the Act as hereinabove quoted.

10.

Defendants answer paragraph 9 of the complaint by stating that the same, being a quotation of Section 13, Subsections (A) through (D), requires no admission nor denial.

11.

Defendants answer paragraph 10 of the complaint stating that the same, being a quotation of Section 13(E) requires no admission nor denial.

12.

Defendants deny each and every allegation contained in paragraph 11 of the complaint, and for further answer,

show that the defendant, Phil Campbell, as Commissioner of Agriculture of the State of Georgia, has been enforcing the provisions of said Act so as to require identification of tobacco by requiring white identification tags for Type 14 tobacco, and the use of blue identification tags for tobacco other than Type 14. Defendants further deny that the identification is based solely on geographic areas of production, but specifically allege that the identification is solely by type.

[fol. 20] 13.

Defendants deny each and every allegation contained in paragraph 12 of the complaint insofar as it is alleged that under existing Federal law, the type of tobacco offered for sale is definitely established. Defendants admit the allegations contained in paragraph 12 as to the grading and classification of tobacco offered for sale under existing Federal law, but specifically deny that any Federal law, rule or regulation requires the type of the tobacco offered for sale to be indicated on the identification tags attached thereto. Defendants further show that the grade or classification are not involved in this controversy in any manner.

14.

Defendants deny each and every allegation contained in paragraph 13 of the plaintiffs' complaint, and for further answer, defendants show that the Act of the State of Georgia does not place a burden upon interstate commerce, but in truth and in fact, aids interstate commerce.

15.

Defendants deny each and every allegation contained in paragraph 14 of plaintiffs' complaint. Defendants further allege that they are without knowledge or information sufficient to form belief as to the truth of the allegation contained in paragraph 14 of the complaint as to the percentage of tobacco sold on the Statesboro and Swainsboro markets grown in North Carolina and South Carolina.

16.

Defendants admit the allegations of paragraph 15 of plaintiffs' complaint, and by further answer, admit that the complainants have complied with the 1960 Georgia Act prior to July 30, 1960.

[fol. 21]

17.

Defendants deny any and all allegations contained in paragraph 16 of the plaintiffs' complaint that the identification of tobacco under the 1960 Georgia Act was based solely on the geographical origin of the tobacco offered for sale, and that the type of the tobacco offered for sale was based solely on geographical origin. Defendants further answer said paragraph by stating that notwithstanding the alleged disparity in price as between Type 14 and other than Type 14 tobacco, such price differential is not necessarily the result of the identification under the Georgia Act in that such price disparity could well be justified in the difference in the type of such tobacco, and could be a reasonable disparity based upon the "type" factor. Defendants admit the allegations that the 1960 tobacco selling season opened in Georgia on July 28, 1960, and that sales were held on that date and on July 29, 1960. Defendants deny that the alleged disparity in price was a result of the identification under the 1960 Georgia Act.

18.

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of plaintiffs' complaint.

19.

Defendants deny each and every allegation contained in paragraph 18 of plaintiffs' complaint and for further answer, defendants show that the identification under the 1960 Georgia Act is the valid exercise of the police power of the State of Georgia.

20.

Defendants deny each and every allegation contained in paragraph 19 of plaintiffs' complaint.

21.

Defendants answer paragraph 20 of plaintiffs' complaint [fol. 22] stating that the amount of the bond for any damages the defendants may sustain by the improvidential grant of a preliminary injunctive relief is such that is not capable of accurate measurement in that the loss to the actual parties defendant would be negligible, whereas the loss to the tobacco industry as a whole is not capable of accurate measurement.

22.

Defendants deny each and every allegation contained in paragraphs 21 and 22 of plaintiffs' complaint.

Wherefore, defendants pray judgment that the plaintiffs take nothing by reason of their complaint on file herein, but that the same be dismissed with costs.

Eugene Cook, The Attorney General, G. Hugher Harrison, Assistant Attorney General, Counsel for Defendants, Office and Post Office Address: State Judicial Bldg., Capitol Square, Atlanta, Georgia.

[fol. 23] *Duly sworn to by Phil Campbell and Cecil Attaway, Jurats omitted in printing.*

[fol. 24] Certificate of Service (omitted in printing).

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

MOTION OF GEORGIA FARM BUREAU FEDERATION, INC. TO INTERVENE AS A DEFENDANT—Filed August 15, 1960

Comes now the Georgia Farm Bureau Federation, Inc., a Georgia corporation, and moves for leave to intervene as a defendant in this action, and for grounds thereof shows:

1.

Movant is a non-profit corporation whose membership is composed entirely of farmers or persons dealing with farmers or having an interest in agriculture.

2.

Movant has a membership of approximately 31,000 who are engaged in agricultural pursuits, indirectly or directly, and whose livelihood is dependent upon a sound agricultural economy in this State, and of this total membership approximately 12,000 are farmers engaged in the actual production and marketing of tobacco in the State of Georgia commonly known as type 14 tobacco.

[fol. 26] 3.

In most instances, the major cash income of these farmers is derived from their crop of tobacco and their livelihood is in large measure dependent upon being able to receive the maximum market price for their production.

4.

The policies of movant are formally set at their State Convention and these policies result from local area discussions among persons who are directly interested in the various commodities grown by Georgia farmers, including tobacco.

5.

Pursuant to the discussions aforesaid, and the grave concern of the membership of movant directly engaged in the production of tobacco over the effect of the sale of non-type 14 tobacco in the State of Georgia, and its adverse effect upon the tobacco producing membership of movant, at its State Convention in Columbus, Georgia on November 18, 1959, movant adopted a policy to support legislation calling for the identification of tobacco according to type.

6.

Pursuant to that directive, movant sponsored and supported the legislation here under attack.

7.

Movant's defense and the main action have a question of law or fact in common and movant and its membership have a special and pecuniary interest in the outcome of the pending litigation.

8.

The permitting of movant to intervene will not unduly de- [fol. 27] lay or prejudice the adjudication of the rights of the original parties. Movant stands ready to proceed to trial on the issue in question at the pleasure of the Court and the convenience of the original parties.

9.

This motion is accompanied by a pleading setting forth the defense for which intervention is sought. As appears from the certificate attached hereto, this motion to intervene has been served upon all parties affected thereby.

Wherefore, movant prays that it be permitted to intervene as a party defendant in this case.

Bloch, Hall, Groover & Hawkins, Attorneys for Movant.

Bloch, Hall, Groover & Hawkins, 710 Walnut Street Building, Macon, Georgia.

[fol. 28] NOTICE OF MOTION

To: Darius N. Brown, Homer S. Durden and William J. Neville, Attorneys for Plaintiffs, and Eugene Cook, Hughel Harrison, Gordon Knox, Jr., Chris B. Conyers and Frank S. Twitty, Attorneys for Defendant

Please take notice that the undersigned will bring the above Motion to Intervene before the Court at the Courthouse in Brunswick, Georgia, on the 16th day of August, 1960, at 11:00 in the forenoon of that day, or as soon thereafter as counsel can be heard.

Bloch, Hall, Groover & Hawkins, Attorneys for Movant.

[fol. 29] Certificate of Service (omitted in printing).

[fol. 29a] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE—Filed August 15, 1960

Come now the complainants, William Hussey, Jr., et al., by their attorneys and file objections to Georgia Farm Bureau Federation, Inc. being allowed to intervene which objections are as follows:

1.

The claim of Georgia Farm Bureau Federation, Inc. and the main actions have no question of law or fact in common.

2.

The Georgia Farm Bureau Federation, Inc. is not an indispensable party to the action.

3.

Should the Georgia Farm Bureau Federation, Inc. be allowed to intervene it will unduly delay or prejudice the adjudication of the rights of the original parties.

Homer S. Durden, Jr., Swainsboro, Georgia; Darius N. Brown, Swainsboro, Georgia; Neville and Neville, By: William J. Neville, Statesboro, Georgia.

[fol. 29b] Certificate of Service (omitted in printing).

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—August 15, 1960

The Court having considered the Motion of Georgia Farm Bureau Federation, Inc., to be allowed to intervene, and having considered the objections filed to that motion; it is considered ordered and adjudged that the motion of Georgia Farm Bureau Federation, Inc., to intervene be and the same hereby is granted and the said Georgia Farm Bureau Federation, Inc., is hereby allowed to intervene as a party defendant in said case and is hereby made a party defendant to said case.

This 15th day of August, 1960.

Warren L. Jones, Circuit Judge, Presiding for the Three Judge Court.

[fol. 32] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

AMENDMENT OF ORIGINAL COMPLAINT—Filed August 15, 1960

Now come plaintiffs, Aulbert J. Brannen, Sr., Aulbert J. Brannen, Jr. and Robert B. Brannen, and move the Court for an Order permitting them to amend the original complaint filed herein as follows:

1.

By adding a new paragraph to said original complaint, the same to be designated as paragraph 23, and reading as follows:

23.

Plaintiffs, Aulbert J. Brannen, Sr., Aulbert J. Brannen, Jr. and Robert B. Brannen, show that they are a partnership engaged in the growing of tobacco in Bulloch County, Georgia, during 1960; that they have planted 14.18 acres of tobacco, much of which has been harvested and cured and offered or to be offered for sale on Statesboro Tobacco Market; that by reason of the chaotic and demoralized condition of the market described hereinabove, these plaintiffs apprehend that they will suffer loss of the value of their crop of tobacco, in part, and that they, as well as others similarly situated will suffer such loss as to the 1960 season as well as future seasons, based upon confused and sporadic bidding and movement of tobacco in the market place, reflecting the absence of an orderly and harmonious market and lack of competition for their tobacco as may reasonably be calculated, and not speculated, as a concomitant of [fol. 33] a stable and orderly flow of the tobacco crop through the market place; that they, each of them, and others similarly situated, such other growers being, in part, the customers of these plaintiffs, have, as an incident of ownership of said tobacco crop, the right to market same in an orderly and harmonious market, in the absence of chaos,

confusion and demoralization; that these plaintiffs, as to that portion of their crop already sold, have suffered a loss of approximately five cents per pound below what said portion of their crop would have brought if sold at a later date on the same market, notwithstanding that the demand for tobacco by the manufactors was bound to be weaker than at the earlier date; that this loss reflects an aggregate loss of about $900.00 to these plaintiffs Brannen; and that these plaintiffs are entitled to relief by reason hereof, as set forth in the prayers of the original complaint in said matter.

Homer S. Durden, Jr., Swainsboro, Georgia; Darius N. Brown, Swainsboro, Georgia; Neville & Neville, By: William J. Neville, Statesboro, Georgia, Attorneys for Plaintiffs.

Duly sworn to by Aulbert J. Brannen, Jr. Jurat omitted in printing.

[fol. 34] NOTICE OF MOTION

To: Honorables Eugene Cook, Attorney General; G. Hughel Harrison, Assistant Attorney General; Gordon Knox, Frank S. Twitty, and Chris B. Conyers, Deputies Assistant Attorney General; Attorneys for Defendants.

Please take note that plaintiffs in the above styled case, upon affidavit shown, will, in Brunswick, Georgia, at 10:00 a.m., on August 16, 1960, or as soon thereafter as the Court will hear Counsel, move for an Order permitting plaintiff to file the proposed amendment to the original petition in said case, a copy of which is hereto annexed and herewith served upon you.

August 16th, 1960.

Darius N. Brown, Homer S. Durden, Jr., Neville & Neville, By: Wm. J. Neville, Attorneys of record for Complainants.

ORDER TO SHOW CAUSE—August 16, 1960

Brunswick, Georgia.

The foregoing read and considered; ordered that defendants show cause before me at 10:00 a.m., on August 16, 1960, in Brunswick, Georgia, at the United States Court House, why the above stated amendment to the original complaint should not be granted and allowed.

Let counsel for plaintiffs serve counsel for defendants in said matter and make certificate thereof, to complete service therein.

This August 16, 1960.

....., Judge, United States District Court.

[fol. 35]

ORDER OF COURT GRANTING LEAVE TO AMEND PETITION—August 16, 1960

Now, on this August 16, 1960, this cause coming on to be heard, upon motion of plaintiffs to file amended complaint, it is ordered that plaintiffs have leave to file the amendment to the complaint and that service thereof heretofore made be allowed as a completed service thereof, and that defendant may file plea thereto on or before day of August, 1960.

This August 16, 1960.

....., Judge, United States District Court.

[fol. 35a] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

DEFENDANT'S WAIVER OF OBJECTIONS TO VENUE—Filed August 15, 1960

Now Come the Defendants, Phil Campbell, Commissioner of Agriculture of the State of Georgia, and Cecil Attaway,

acting by and through their attorneys of record and waive their contention that the venue in the above styled action is improperly laid and should be either in the Northern District of Georgia or the Middle District of Georgia, and do hereby consent that said matter may be heard and determined in the United States District Court for the Southern District of Georgia.

Done in open court this 16th day of August, 1960.

Eugene Cook, Attorney General, G. Hughel Harrison, Assistant Attorney General, Gordon Knox, Jr., Deputy Assistant Attorney General, Chris B. Conyers, Deputy Assistant Attorney General, Frank S. Twitty, Deputy Assistant Attorney General.

[fol. 36] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

STIPULATION OF PARTIES—Filed December 8, 1960

We, the undersigned counsel of record for the parties to the within and foregoing matter have entered into the following stipulations prior to the beginning of the hearing of this matter before the Court on August 16, 1960:

1. That complainants have invested approximately $750,000.00 for the construction and equipping of their tobacco auction warehouses on Swainsboro and Statesboro, Georgia, markets.

2. Said warehouses were built and equipped primarily as tobacco auction warehouses.

3. Defendant is enforcing the Act of the State of Georgia complained of according to its terms.

4. As an official standard of the United States the Federal Government has, under the Federal Tobacco Inspection Act, designated Types 11, 12, 13 and 14, known as flue-cured tobacco, and has designated as Type 14 tobacco only flue-cured tobacco grown in Georgia, Florida, and Alabama.

5. Under the Federal Tobacco Inspection Act the Federal Government has also established an official standard of grades of tobacco, which are the official standard of grades of tobacco of the United States consisting of 168 different grades of flue-cured tobacco.

[fol. 37] 6. The Secretary of Agriculture of the United States has, by proper Rules and Regulations, implemented the Federal Tobacco Inspection Act.

7. For several years approximately 50 percent of the total tobacco sold on the Statesboro and Swainsboro, Georgia, Tobacco Markets was grown in North Carolina and South Carolina.

8. The United States Secretary of Agriculture designates tobacco auction markets, and under applicable laws, rules and regulations sales are limited to 440 baskets per hour per set of buyers, five hours per day and five days per week. Under the foregoing Statesboro has a maximum authorized sale of 4400 baskets of tobacco per day and Swainsboro 2200.

9. Complainants show that the 1960 tobacco selling season opened in Georgia on July 28th, 1960, and sales were held on that date and on the 29th of July following; that large quantities of tobacco from North Carolina, South Carolina and Georgia were exposed for sale on said days; that the tobacco from the several states mentioned were all graded immediately prior to sale in the manner aforesaid and that such grades were assigned by official graders of the United States Department of Agriculture. The result of the sales for the two days mentioned revealed a disparity in price, offered or received for the tobacco from the Carolinas, bearing the blue identification tag mentioned and that of Georgia tobacco bearing the white tag mentioned. The said disparity on the whole was as much as $18.00 per hun-

dred pounds in favor of the Georgia tobacco bearing a white tag as required by the Act complained of.

Darius N. Brown, Homer S. Durden, Jr., Joseph Neville, Attorneys for Complainants.

[fol. 38] Eugene Cook, The Attorney General, G. Hughel Harrison, Assistant Attorney General, Gordon Knox, Frank S. Twitty, Chris B. Conyers, Attorneys for Defendants.

Denmark Groover, Jr., Attorney for Intervenor.

[fol. 40]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

Number 326

In Equity.

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY, Complainants,

vs.

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and CECIL ATTAWAY, Defendants.

Transcript of Proceedings

APPEARANCES:

For the Complainants: Mr. Homer S. Durden, Jr., Mr. Darius N. Brown, Attorneys at law, Swainsboro, Georgia, and Mr. William J. Neville, Attorney at law, Statesboro, Georgia.

For the Defendants: Mr. Eugene Cook, Attorney General of Georgia, Mr. G. Hughel Harrison, Assistant Attorney [fol. 41] General of Georgia, and Mr. Chris B. Conyers, Attorney at law, Brunswick, Georgia. Mr. Gordon Knox, Attorney at law, Hazlehurst, Ga. Mr. Frank S. Twitty, Dept. Assistant Attorney Generals of Georgia. Mr. Denmark Groover, Jr., Attorney at law, Macon, Georgia.

A transcript of the proceedings had in the trial of the heretofore stated case before a three-judge court composed of Hon. Warren E. Jones, Fifth Circuit Court of Appeals, Hon. Frank M. Scarlett, Judge of the United States District Court for the Southern District of Georgia, and Hon. Bryon Simpson, Judge of the United States District Court for the Southern District of Florida, at Brunswick, Georgia, August 16th and 17th, 1960.

PRELIMINARY DISCUSSIONS BETWEEN COURT AND COUNSEL

Judge Jones: Before we start, it might be well to inquire as to whether or not there are any appearance of counsel that are not yet noted on the record.

Mr. Groover: Your Honor, this is Denmark Groover, of Macon, Georgia, a member of the firm of Bloch, Hall, Groover and Hawkins. Pending in the original papers—whether it has been presented to the Court, I am not sure, [fol. 42] but there is a motion on behalf of the Georgia Farm Bureau Federation for permission to intervene in this case. That motion is directed to this court's discretion. We recognize—of course, it is brought under 24(b)2, and is purely discretionary, so far as this court is concerned.

As a basis for our motion, if the Court pleases, we allege that our membership of some 35,000, which is a typographical error in the motion, as it is 31,000; that our membership is concerned primarily with the agricultural interest in this state; that among our members are some 12,000 tobacco farmers whose main principal cash income is the sale of tobacco.

Judge Jones: Is that set forth in your motion?

Mr. Groover: Then— Yes, sir, it is set forth in our motion.

Judge Jones: Then it will be given consideration.

Mr. Durden: Your Honor, we have a motion in opposition to the motion of the Farm Bureau.

Judge Jones: Has it been filed?

Mr. Durden: No, sir. I have it to file.

Judge Jones: Submit it to the defendants and to the court clerk for filing.

Mr. Harrison: Your Honor, I am of counsel for the defendants and I would like permission to file a motion to dismiss, which has been served upon the plaintiffs by the defendants.

Judge Jones: Let it be filed.

[fol. 43] Mr. Durden: Your Honor, I have a motion to strike the defendant, Cecil Attaway, and a waiver of objection to transfer for trial, which I would like to file.

Judge Jones: Let it be filed. From this motion then it appears that the plaintiffs are conceding that the jurisdiction should not be in the Southern District of Georgia. Is that correct?

Mr. Durden: Yes, sir.

Judge Jones: The venue?

Mr. Durden: Yes, sir, the venue. We are waiving any objections that we might have to having the venue down here to avoid any possible error or technicality if this matter should be appealed.

Judge Jones: Do you, by this motion, waive any objection being in the Southern District of Georgia?

Mr. Durden: No, sir. We are willing to have the case heard wherever the defendants want it heard, Your Honor. In other words, we have no objections to it being tried in the Southern District of Georgia, Middle District of Georgia, or the Northern District of Georgia.

Judge Jones: Has the Attorney General had an opportunity to consider this motion?

Mr. Cook: May it please the Court, may I confer about one-half a minute with my staff?

[fol. 44] Judge Jones: Yes, indeed.

Mr. Cook: If the Court please, I presume this is in the nature of a pre-trial conference. As I understand it, this would be a hearing on the question of the interlocutory injunction, would it not? Is that the feeling of the Court

that this is one on the question of whether the interlocutory injunction should be continued?

Judge Jones: I think that, in the event, that the jurisdiction is determined to be in the Southern District of Georgia, or in the event that objection to venue being waived, then we would proceed with the hearing of the causes. If objection to venue is not waived, and in the event it is determined that the case was improperly brought in this District, then there would be either a transfer or a dismissal, and what; we are about here this morning I think would stop. Those are the tentative conclusions of the court and, of course, if counsel would like to argue with respect to any of those conclusions we would lend an attentive ear.

Mr. Cook: I think Your Honor has answered my question. It is obvious then that you would most likely go to the question of jurisdiction at this hearing?

Judge Jones: The question of venue is before us. If the case is improperly brought in this District then the venue is not waived then this three-judge court, as presently constituted, would not be empowered, under the tentative view [fol. 45] we have, to go further with the consideration of the cause on its merits.

Mr. Cook: May it please the Court: We are willing to proceed with the case in its present posture.

Judge Jones: The objection to the venue in the Southern District of Georgia is waived?

Mr. Cook: As to venue, yes, sir.

Mr. Durden: May it please the Court, at this time we have an amendment to the original complaint that we would like to have filed.

Judge Jones: All right. In view of waiver of venue on behalf of the officials of the state, do the plaintiffs wish to withdraw their motion to strike the defendant, Attaway?

Mr. Durden: Your Honor, we have determined that the defendant, Attaway, is a mere nominal party, and we have no objection to him remaining as a defendant or being dropped. The offer to drop the defendant, Attaway, was to cure any possible defect on venue, and I would like to consult with opposing counsel a few minutes, if the Court will grant us an opportunity.

Mr. Cook: We have waived our objections to venue.

Judge Jones: Well, if counsel wishes to confer with you, we will ask you to listen to him.

Mr. Durden: We do not insist on that motion, sir.

Judge Jones: Will the counsel for the defendant, in view of the motion, prepare and file, as early as convenient, a [fol. 46] written waiver that will go into the record to cover what has been stipulated? Are there any other matters that should be taken up as a matter of pretrial?

Mr. Groover: Your Honor, at this stage, I might say that I am still not permitted to address the Court in that area, however there is accompanying the motion to intervene, pleadings as required, among which is a motion to dismiss; and I am advised that the original defendants have filed a motion to dismiss, and is it the Court's pleasure, or will it be the Court's pleasure that such a motion be argued during this pretrial, or to wait the opening of the hearing?

Judge Jones: Are any issues being tendered on behalf of your client that are any different than those that are already raised by the defendants?

Mr. Groover: No, sir.

Judge Jones: Then what useful purpose, sir, could be served by you coming into this case?

Mr. Groover: The useful purpose that we conceive we serve, Your Honor, is this: This action is brought against the Commissioner of Agriculture in his official capacity. The impact of a decision in this case will directly affect the membership of the movant in this case. The financial effect will be directly upon them.

Judge Jones: Does anyone care to oppose the motion of [fol. 47] the Georgia Farm Bureau Federation to intervene?

Mr. Durden: Yes, Your Honor, we would insist on our motion objecting to them intervening. Would you like to hear from me at this time, sir?

Judge Jones: What harm are they going to do you?

Mr. Durden: We feel that it will needless clutter up the record. We don't see where the Farm Bureau, as an Agency, can speak for its members. It so happens that two of the counsel for the plaintiffs are Farm Bureau members, and we certainly don't feel that the Farm Bureau should speak for us when they intervene, and we; feel that a large num-

ber of other Bureau members are situated as we are. We can't see where a claim of the Farm Bureau in the main action have any question of law or fact in common. The Farm Bureau is not an indispensible party to the suit, and we feel that if they are allowed to intervene it will seriously prejudice our standing. We have absolutely no objections to the Farm Bureau filing a brief with the Court as a friend of the Court.

Judge Jones: The motion to intervene will be taken and considered on a ruling later. A ruling will be made. Is there any manner by which we can shorten the time that will be required to take testimony submitted on this matter? There are allegations in the complaint, and there are allegations in the answers to the extent that there are fact issues [fol. 48] that seem to be rather narrow fact issues. Would it serve any useful purpose to suggest a consideration by counsel of fact issues that may be involved before us this morning?

Mr. Cook: Do I understand the Court to mean by that, is there any possibility of counsel agreeing on certain stipulations as to some of the facts that might develop here?

Judge Jones: Yes. That's correct. And consider, also, whether we can use the testimony that was taken before Judge Scarlett prior to his entry of his order in this case?

Mr. Cook: May I inquire of the Clerk if that has been transcribed?

The Clerk: Yes, sir. We have it.

Mr. Cook: Now, may it please the Court, we, as counsel for the defendants, think there are certain areas that we might stipulate on facts, if we could confer with counsel for the plaintiff.

Judge Jones: While you are considering that, are there any other matters that we need to take up as a pretrial?

Mr. Harrison: Your Honor, there is a motion to dismiss that is pending that is identical with the motion of the intervenor, and the defendants would have no objections to those motions being heard together.

Judge Jones: Subject to a change of ruling the motion to dismiss will be carried with the case. We will now retire [fol. 49] and give counsel an opportunity for considering the problems of proof here and particularly the question

with respect to the use of the testimony already taken on the motion to dissolve.

The Marshal: Take a recess until further notice.

Note: At this point a recess was had from 11:05, A. M., until 2:00 o'clock, P. M. of the same day, at which time the proceedings were resumed as follows:

Judge Jones: We have already sent word to counsel that the motion of the Georgia Farm Bureau Federation to intervene would be granted. Counsel for the Intervenor will prepare and submit an order allowing the intervention, and its motion to dismiss and answer will be received and filed.

Is counsel now prepared to advise the Court with respect to the efforts to reach some stipulations as to facts?

Mr. Neville: We are ready, may it please the Court. I am William J. Neville, of counsel for the plaintiffs, along with Mr. Darius N. Brown and Mr. Homer S. Durden, Jr. We have met with counsel for the defendants and, if I may, I would like to read the stipulations of counsel, if the Court would desire.

Judge Jones: Proceed.

Mr. Neville: Counsel for all parties stipulate as follows:

1. That Complainants have invested approximately $750,000.00 for the construction and equipping of their [fol. 50] tobacco auction warehouses on the Swainsboro and Statesboro Georgia Markets.

2. Said warehouses were built and equipped primarily as tobacco auction warehouses.

3. Defendant is enforcing the Act of the State of Georgia complained of according to its terms.

4. As an official standard of the United States the Federal Government has, under the Federal Tobacco Inspection Act, designated Types 11, 12, 13 and 14, known as flue-cured tobacco, and has designated as Type 14 tobacco only flue-cured tobacco grown in Georgia, Florida and Alabama.

5. Under the Federal Tobacco Inspection Act the Federal Government has also established an official standard of grades of tobacco, which are the official standard of grades of tobacco of the United States consisting of 168 different grades of flue-cured tobacco.

6. The Secretary of Agriculture of the United States has, by proper Rules and Regulations, implemented the Federal Tobacco Inspection Act.

7. For several years approximately 50 percent of the total tobacco sold on the Statesboro and Swainsboro, Georgia, Tobacco Markets was grown in North Carolina and South Carolina.

8. The United States Secretary of Agriculture designates tobacco auction markets, and under applicable laws, [fol. 51] rules and regulations sales are limited to 440 baskets per hour per set of buyers, five hours per day and five days per week. Under the foregoing Statesboro has a maximum authorized sale of 4400 baskets of tobacco per day and Swainsboro 2200.

Mr. Neville: As to the 9th stipulation I would like to ask Mr. Durden to read with respect to certain of the pleadings, if Your Honors please.

Judge Jones: Very well.

Mr. Durden: Ninth: Complainants show that the 1960 tobacco selling season opened in Georgia on July 28th, 1960, and sales were held on that date and on the 29th of July following; that large quantities of tobacco from North Carolina, South Carolina and Georgia were exposed for sale on said days; that the tobacco from the several states mentioned were all graded immediately prior to sale in the manner aforesaid and that such grades were assigned by official graders of the United States Department of Agriculture. The result of the sales for the two days mentioned revealed a disparity in price, offered or received for the tobacco from the Carolinas, bearing the blue identification tag mentioned and that of Georgia Tobacco bearing the white tag mentioned. The said disparity on the whole was as much as $18.00 per hundred pounds in favor of the Georgia tobacco bearing a white tag as required by the Act complained of.

Judge Jones: Are there any other stipulations?

[fol. 52] Mr. Neville: There are no other stipulations, may it please the Court. Counsel would inquire at this time whether the Court desires the pleadings to be read, or read responsive, or for that to be dispensed with?

Judge Jones: The judges of the court have read the pleadings, and we see no necessity for consuming the time of either the court or counsel in having them read at this time.

Mr. Neville: All right, sir.

Judge Jones: I would appreciate you re-reading the fourth paragraph of your stipulation.

Mr. Neville: All right, sir. Fourth: As an official standard of the United States the Federal Government has, under the Federal Tobacco Inspection Act, designated Types 11, 12, 13 and 14, known as flue-cured tobacco, and has designated as Type 14 tobacco only flue-cured tobacco grown in Georgia, Florida and Alabama.

Judge Jones: I understand that there is a stipulation that this allegation of the complaint may be taken as true? Was that stipulation taken from the complaint?

Mr. Neville: Yes, sir.

Judge Jones: What is the effect—what do you intend to do about paragraph four of the stipulation?

Mr. Neville: Your Honor, paragraph four of our stipulation is the one that I just re-read to the court. Now, Mr. [fol. 53] Durden read with respect to paragraph nine of the stipulation certain allegations from the original complaint.

Judge Jones: Is it stipulated that those allegations are true?

Mr. Neville: Yes, sir.

Judge Jones: Then a part of the stipulation just happened to be a part of the same language as appears in the complaint?

Mr. Neville: I would call the court's attention to the fact that we deleted certain words from the pleadings and read the remainder as stipulations which would not require proof, after deletion.

Mr. Harrison: Your Honor, for the information of the court, paragraph nine of the stipulation was taken from paragraph sixteen of the petition.

Judge Jones: Going back to four, does that incorporate what you have agreed upon as to the Federal Regulations?

Mr. Neville: Yes, sir, it does. I might say that it makes reference to the subject treated thereunder Title 7 of Sec-

tion 515(a) definitions, and it is mentioned there and elsewhere under the Tobacco Act.

Judge Jones: Then the Federal Regulations, the copy before us, designates Type 14 as Type flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida and Alabama, produced principally in the [fol. 54] southern section of Georgia and to some extent in Florida and Alabama. Now, do you have "principally" and "to some extent" in the stipulation?

Mr. Neville: I don't think I have that, Your Honor. May I approach the Bench?

Judge Jones: Yes.

Note: Conference at the Bench between the Court and counsel.

Judge Jones: The provision of the Regulation that we are discussing is CFR 29.11. The latest paragraph begins at 29.1097. Would counsel care to outline the factual issues remaining?

Mr. Neville: We would, Your Honor. It might be proper to inquire here with reference to the motion to dismiss. As I recall, the Court announced earlier that would be considered during the trial.

Judge Jones: The motion to dismiss will be carried with the case.

Opening Statement of Mr. Neville on Behalf of Plaintiffs

Mr. Neville: Yes, sir. Then if I may make a brief statement in behalf of the plaintiffs in this case, we would have this to say to the court:

The Statesboro Tobacco Market is rather old. It was established some thirty years ago. Swainsboro is a relatively new market, being some seven years old. Through these markets about half of the tobacco sold there comes [fol. 55] from the Carolinas, and some smaller amount from Virginia. Through the years from 1959, with reference to Statesboro, Statesboro had been for a good many years, the largest market in Georgia. In 1960, the Georgia Act complained of, provided that Type 14 tobacco, which has been classified by the Secretary of Agriculture as being that flue-cured tobacco traditionally grown in Alabama,

Florida and Georgia, would bear a white tag with Type 14 prominently displayed on the tag in addition to the requirements of the Federal Government with reference to grading and other data required by Federal Law. The Georgia Act required as to tobacco other than Type 14, which categorically excluded tobacco except from Georgia, Florida and Alabama, that it must bear a blue tag and have prominently displayed on it its Type 13, or whatever would be the case. Pursuant to this state Act the plaintiffs here complied with the State law, and the market opened on the 28th of July, this year. The first day of sale on the Georgia Market is traditionally on Thursday, and sales had on Thursday in these market places and again on Friday. When the tobacco was displayed for sale in these warehouses and the sale was undertaken it was noted by the plaintiffs in this case that almost categorically that the piles nor sheets or baskets of tobacco bearing blue tags were rejected or not bid upon, that in those cases, or many of them, where bids were received they were ridiculously low and it was noted that these baskets of tobacco bearing blue tags, while in many, many instances they bore the [fol. 56] same government grading as the white tagged neighboring basket failed to receive a bid, while the converse was true of the white tagged tobacco.

It would be fair to explain to the court that the government grade affixed on a pile of tobacco is done immediately prior to sale. This Government Grader applies the grade as being one grade of 168 grades, which are listed on this card here, and these various grades have code numbers or letters or combinations.

The plaintiffs take the position in this case that the tagging is discriminatory and for reasons beyond control of the plaintiffs that tobacco of identical quality and grade and character received a very large disparity in bids and in many instances no bid at all for the blue tag.

The conditions of the Statesboro Market—and I would like to pick up this exhibit here. I think it would be helpful at the outset here—the condition of the Statesboro Market in 1959 was well known with respect to the plaintiff, Brannen, whom this exhibit concerns, and what I will show to the court here is a graphical display. The black repre-

sents the business of 1959 with respect to pounds moving through Brannen's warehouses. The level of the pounds moving through th warehouses through the first 15 days, and that is from the beginning of sales this year up to now and for a corresponding period of last year, would show an almost level flow of tobacco, about 300,000 pounds per day through those warehouses. Now, the blue marks here [fol. 57] represent the flow in the hundreds of thousands of pounds in the corresponding days of sales this year. Now, what has happened is the disparity here in volume is the amount of tobacco not moving through those houses for corresponding times. The first day of sale of last year was 291,000, in round figures. The first day of sale this year was 185,000, more than a 100,000 pounds off on the first day of sale, and the first day of sale traditionally is a very brisk day of selling and bidding and moving out of tobacco. The market became demoralized that very first day. Many people were prompted to withhold their leaf from sale on the second day, and with the result on the second day of sale in Brannen's three warehouses there moved only 63,000 pounds of tobacco as against 296,000 pounds in the year before, just slightly more than one-fifth. About 80 percent of his volume was gone overnight. The plaintiffs in this case obtained an interlocutory injunction here and the next or third day of sale was a Monday, the third day of the sale. Now, the corresponding day of last year was still at this level of about 300,000 pounds straight through, and the market there climbed from a low on a Friday of 63,000 pounds to 224,000 pounds, about four to one. Now, if the Court will note the rest of these days are set forth by sale day. This is not the date of the month.

We will expect to show that while the market made a dramatic improvement over the week end. It suffered some [fol. 58] fluctuations on down to this time, and generally the grouping of this volume here was a larger volume of tobacco than back here at the beginning of the market. What to us is significant is that none of these figures this year approached the figures of last year, nor do they show a regular flow. We are still in a turmoil in that market,

although it has improved dramatically. Now, with respect to the lower portion of the chart, showing the dollar volume, gross sales, there again I would say that the black represents last year, and this is set off in increments of thousands here. This figure here is $180,000.00, daily gross sales. We can readily see that all the black closely approaches or slightly surpasses the daily averages of these thirteen days of last year of $180,000.00 per day. Now, this year, under the blue tag, this market, on its very first day the sales was $91,000.00 as against $171,000.00 last year, or $80,000.00 difference in volume. The second day corresponds with this figure here, somewhat in proportion, and the dollars in gross sales the second day was $34,000.00 as against last year of $174,000.00, or about five to one. These latter volumes here correlate very closely across the days of sale here with the blue movement of tobacco.

Now, it will be the plaintiffs' purposes here to illustrate that there has been placed a burden on interstate commerce rather more than to become argumentative about averages. We read the papers and we are told by the pleadings and on [fol. 59] the earlier hearing about averages. We take the position that the averages spoken of is simply the gross product moving through the market, divided by the sales and applied to the total dollars, and the averages alone never reflect what a person sold at a fair or an unfair price.

We take this position also that this custom built on the Statesboro and Swainsboro markets through the years has been done at considerable expense, and our clients have gone into the Carolinas and have maintained expensive operations. The role of the warehouseman here is to represent the grower of tobacco. He is to see that his tobacco is properly and adequately and properly handled and the warehouseman will bid competitively against the buyers representing buying companies so as to support the price paid to his customers, the growers. The warehouseman's duties to the buyers of tobacco is to see that they are delivered what they bought and promptly and in a safe condition.

We show, therefore, that the plaintiffs in this case are in the role of representing many growers as their commis-

sion merchants, and it is their plight that has brought us into court as well as our own.

Now, we might say this: That the Type 14, which resulted in the blue tag for out-of-state tobacco, effectively speaking, and a white tag for Georgia tobacco did demoralize the market, as we will show. And we put our [fol. 60] case on this simple hypothesis that if the Savannah River, lying between Georgia and the Carolinas, makes categorically two different kinds of tobacco, one which is not worth as much as the other, then the expert buyers, who represent these companies, do not need a blue tag to tell that quality apart. And, on the other hand, if those two tobaccos are the same then they do not need to be discriminated against by blue tags.

Judge Jones: Somewhere in your argument, or in your evidence, in your citation of authorities, you will explain to us why it makes a difference to the buyer as to whether or not it had a blue tag or a white tag with the kind and quality being the same.

Now, the position of loss here is this: The warehousemen are commission merchants. Their commissions are two and a half percent of gross sales. Their commissions have fluctuated with the sales in terms of dollars, reflected by volume and with the handling of this product in interstate commerce. Their investments and obligations are heavy. We think that their losses are not speculative but that on the basis of the history of last year and preceding years and the recent history of this market, since its opening day and since it has become stabilized will illustrate their losses. We understand, sir, that the plaintiffs are not given any statutory right to make so much money or any guarantee. But this keys, sir, into the proposition that on [fol. 61] the Statesboro Market only 4400 baskets of tobacco may be sold. The warehouses on that market are divided up those available baskets, and to that extent they have a fixed operation. In the long term of a tobacco season the volume they will handle per basket will about average out, so being able to sell in the past this 4400 baskets and being able to sell far less than that this year on these dates, we say against that it illustrates the volume of that market.

On the first day of sale which, as I mentioned, is traditionally a brisk day of bidding and selling, when 4400 baskets of tobacco were available to be sold, or approximately that figure, only 2700 were sold. This left the farmers with 1300 baskets of unsold tobacco, sitting on the floor, waiting for the next sale. Most of that tobacco was blue tagged tobacco from the Carolinas. They waited for the second day and when the results of the first day were in it was so discouraging they refused to sell or if they exposed for sale it was not bid upon, or rejected. That made the second day's sale carry over to the third day, and we will show by one of our warehouseman's witnesses here that it was not until the fourth day that he cleared his first day's flow of tobacco. We will show by that particular warehouseman that his entire sale consisted of the blue tag tobacco, and on his particular operation this year he had on his opening day almost no Georgia tobacco, or Type 14.

[fol. 62] The Court has addressed itself to a matter that we will come to, but we would expect in this hearing today to review a point made by the President of The Georgia Farm Bureau Federation the other day at this hearing in which he stated that it was his opinion that the buyer companies did not want to buy Carolina tobacco in Georgia and then haul it back to Carolina. We have found a number of good grounds to differ with his opinion, but I mention that as a part of my opening statement that that came from the President of The Georgia Farm Bureau.

Judge Simpson: Is there a possibility of some stigma attaching to the blue tag by reason of the sub-standard grading of certain varieties two or three years ago of the Coker 139 and 140 and that other one? They were required to be blue ticketed.

Mr. Neville: That is a striped ticket, sir. It is a white ticket with thin red strips. I believe we have one here.

Judge Simpson: That was the ticket used then for the sub-standard grade?

Mr. Neville: Yes, sir.

Judge Simpson: All right. And this is a blue ticket?

Mr. Neville: Yes, sir.

Judge Simpson: Well, I tried one of those cases. My impression was that it was a striped blue ticket.

Mr. Neville: Yes, sir.

Judge Simpson: All right.

[fol. 63] Mr. Neville: Those were your discount varieties.

Judge Simpson: That's right, your sub-standard grade.

Mr. Neville: Now, what brought that case into being was this: It had been determined that certain varieties of tobacco would produce enormously but the grade was poor with reference to the consumer.

Judge Simpson: It wouldn't do to smoke in filtered cigarettes. That was what it was.

Mr. Neville: And the Secretary of Agriculture has implemented the program by having that inspected in the field, photographed, if necessary, and pre-graded, and then the support is at half price, but I think categorically we can say that no discount variety came into Georgia this year. If we err there it is by a sheet or two or some negligible factor and the Secretary described that tagged with thin red strips across it which immediately identified it to a buyer that it was not for him or his company. Now, Georgia had a discount variety being grown on some limited basis but we are certain that it came under the same ruling. Now, the State of Georgia has come along and categorically tagged this tobacco north of the Savannah River with a blue tag, and on the basis that we have outlined here we think we would understand that it has played havoc with our market. We never had this havoc until the blue tags appeared. This chart here is representative of not only—well, it is repre-

[fol. 64] sentative specifically of last year, but it reflects pretty well previous years.

The Act of Georgia, we believe, on its face, is unconstitutional on at least two counts, and I might call those to the attention of the court at this time. Number one: The Act of Georgia does not do what the pleadings and the defendants undertake to do in this case. It is predicated on the geographical origin of tobacco, and it treats all persons who are similarly situated in different ways, depending on whether they are north or south of the Savannah River. That is number one.

Now, number two, it runs head-long in conflict with Section 515 of Title 7, which is headed up in these words:

"Consent of Congress to production compacts between States; uniformity; withdrawal of consent; limitation on consent."

And I won't undertake to read it all to the court, but to say there are two provisos in that particular section and the language is very specific, and I would like to cite them. After providing that the states may make compacts respecting tobacco, it says:

"Provided, however, That nothing herein contained shall be construed as preventing the Congress of the United States of America from withdrawing its consent—after such a date—and here is the important one: "Provided further, That nothing in sections 515a to 515k of this title shall be construed to grant the consent of Congress to negotiate [fol. 65] any compact for regulating or controlling the production of, or commerce in, tobacco for the purpose of fixing the price thereof or to create or perpetuate monopoly."

Now, we feel sure that if Congress had withheld that authority from making a compact as between states, it would not extend by indirection that authority to the state to regulate by its own muscle and force what would be the price paid for the labor of people from another state or goods they produce. Moreover, we have abundance of evidence here in court that Congress has undertaken to control, not only the planting, but the marketing marking, grading and selling and final disposition of tobacco.

Judge Scarlett: I haven't got it in my head yet. I want you to explain this: What is the reason they didn't buy the tobacco with the blue tag on it? Just why?

Mr. Neville: The complainants have stated a case here, Your Honor, by saying that the out-of-state tobacco has been discriminately tagged, and that when it was put up for sale on the warehouse floor, that it bore a blue tag, different from a Georgia White tag, and in a large measure failed to receive any bids, and they point out that this is completely head-long to the facts of the market in previous years, going back about thirty years.

Judge Scarlett: Well, what I am getting at, why didn't they buy it?

Mr. Neville: The buyers representing the buying com- [fol. 66] panies would not bid, sir, or did not bid.

Judge Simpson: Do you have buyers here as witnesses?

Mr. Neville: I have heard that we have some buyers here. I understand some of them are going to take the Fifth Amendment, if they are put on the stand.

Judge Scarlett: Well, what was the reason they did not bid on it, if you know? That is what I want to know. Why didn't they bid on it?

Mr. Neville: Your Honor, I would like to say this in my place, that the reason I believe it happened is this: That in this particular situation we have a lot of people interested in Georgia not selling Carolina tobacco. These people, for one reason or another, supported, in Georgia, the blue tag law in its inception and in it being passed by the State Legislature, and some of these people are South Carolina Warehousemen who are missing their commissions that they would have had had this product been sold in South Carolina. Some of these South Carolina Warehousemen entertained some very high people in Georgia at the beach cottage—

Judge Jones: (Interrupting) Are you intending to prove that?

Mr. Neville: Excuse me a minute. Counsel, I think you are making a closing, rather than an opening argument, or opening statement. I think we have got sort of a glimmer [fol. 67] of an idea as to what the case is about, and although we are puzzled about a lot of things, we think it can be developed at least as well, or perhaps better, after we have heard so much of the testimony as you may think and your adversary may think it is necessary to put into this record. It seems to me that it might be better for you to save your argument on the law of the case until you can relate it to the facts that have been established.

Mr. Neville: Yes, sir. I would like to say this, if I may, sir, as our closing of the opening statement, that since the blue tags came off, this tobacco has all been sold with identical tag markings, and the price has gone way, way up again.

Judge Jones: Well, this might be a question that we could reserve until the close of the testimony, rather than asking it now; but if this requirement for the blue tag and the white tag had been a federal regulation, would it have been invalid?

Mr. Neville: My brothers and I disagree on that, sir. I think there is room for argument that it might well be.

Judge Jones: Well, it might be a wholly immaterial question anyway.

Mr. Neville: Other counsel are of the opinion that it would be quite valid, sir.

Judge Jones: Does counsel for the defendant care to make any statement at this time?

Mr. Harrison: We will abide by the wishes of the court. [fol. 68] Would you like for us to make a statement at this time?

Judge Jones: If you feel that it will help us in any way by saying something now, why, we will listen with apparent attentiveness.

Opening Statement of Mr. Harrison on Behalf of Defendant

Mr. Harrison: Thank you, Your Honor. In response to the allegations of the petition of the complainants, we expect to prove that prior to 1960 the United States Department of Agriculture, under the Tobacco Inspection Act, had established standards by which types of flue-cured leaf tobacco could be determined.

We expect to prove that under such authority Type 14 has been defined as "that type of flue-cured tobacco commonly known as Southern Flue-cured, or New Belt Georgia, Florida and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama."

We expect to prove that in 1960 the Georgia General Assembly determined the need for legislation as expressed in Section 1 of the Act, hereunder attacked, in the words of the General Assembly, as follows:

"Section 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in [fol. 69] this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold

in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco."

We expect to prove that under the Federal Inspection Act type of tobacco is not a factor used to determine grade and quality.

We expect to prove that under the Federal Tobacco Inspection Act the United States Department of Agriculture does not provide any means to determine the identity of tobacco as to type at the time of sale.

Judge Scarlett: Read that just once more that you read a minute ago.

Mr. Harrison: Under the Federal Tobacco Inspection Act the U. S. Department of Agriculture does not provide any means to determine the identity of tobacco as to type at the time of the sale.

Tobacco is supported in Georgia by stabilization based entirely upon grade and support is not affected in any manner by identification of type.

We expect to prove that Type 14 tobacco because of its aroma and flavor characteristics and other chemical contents is desired by both the domestic and foreign trade and [fol. 70] brings a premium price or a full price to its producers.

We expect to prove that the flavor and aroma characteristics, as well as other chemical contents, cannot be determined by a visual inspection at the time of sale.

We expect to prove that the sale of other than Type 14 tobacco on the Georgia markets, without identity as to type, has resulted in complaints from foreign and domestic trade, in that variation as to types was not discovered until after the purchase.

We expect to prove that the loss of identity of Type 14 tobacco on the Georgia markets has caused a loss of confidence by buyers in the tobacco offered for sale in this state and has resulted in generally depressed prices for unidentified tobacco because buyers hesitated to pay full price for the tobacco when the true identity is not known.

To correct these conditions, the 1960 Georgia General Assembly enacted the Act here under attack. The 1960 Georgia Act adopted the federal identification of Type 14 tobacco, substantially, in Section 1, in these words:

"Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida and Alabama."

This Act required the attaching on the warehouse floor [fol. 71] of a distinct warehouse ticket to each sheet of tobacco offered for sale, so as to indicate its true identity as to its type. Such identification by type does not constitute a grade determination. The grade determination is made by the U. S. Department of Agriculture—a tobacco inspector, under the Federal Tobacco Inspection Act, and entered on the portion of the attached ticket on each pile of tobacco that is reserved for that purpose. The only effect of identification by Type of the tobacco on the warehouse floor, is to cause each type to stand on its own merits.

We expect to prove that the 1960 Georgia Act imposes no burden upon interstate commerce, does not attempt to fix the price or condition of purchase, does not affect the grade determination of the tobacco sold and does not affect the profits or losses of tobacco warehousemen. It seeks only to disclose the simple truth concerning the identity as to the type of tobacco that is offered for sale at the time of the sale.

Judge Jones: Do you concede that there might be regarded there was a difference between the Georgia definition of Type 14 and the Federal definition of Type 14?

Mr. Harrison: Your Honor, we expect to prove that even with the variation in phraseology that there is no conflict but that there is a substantial agreement between the Georgia definition and the Federal definition of Type 14.

Judge Jones: You couldn't grow anything in Georgia [fol. 72] except Type 14 tobacco?

Mr. Harrison: Nothing except Type 14 flue-cured tobacco. We grow some burley and some sunshine.

Judge Jones: You couldn't grow any other across the river?

Mr. Harrison: Under this definition, no sir.
Judge Jones: Under the Federal definition?
Mr. Harrison: No, sir.
Judge Jones: The plaintiffs may call their first witness.
Mr. Neville: Mr. Robert Donaldson.
The Marshal: Robert Donaldson.
Judge Jones: All counsel in this case are able and skilled lawyers, and I hope you won't spend any greater amount of time than is necessary in qualification of your witnesses or in the preliminary matters, and on the other hand I hope there can be a reasonable restraint in objection to questions unless it is mighty material.
Mr. Cook: May it please the Court, we have agreed on one person to cross examine the witnesses and thereby expedite the hearing.
Judge Jones: Thank you, sir.

(Oral testimony begins on next page.)

[fol. 73] Robert F. Donaldson, sworn for the plaintiffs, testified.

Direct examination.

By Mr. Neville:

Q. You are Mr. Robert F. Donaldson?
A. Yes, sir.
Q. Mr. Donaldson, you live in Statesboro, Georgia?
A. Yes, sir.
Q. What is your occupation, sir?
A. In connection with tobacco. I am Sales Manager or Supervisor on the Statesboro Market.
Q. Sales Supervisor on the Statesboro, Georgia, market?
A. Yes, sir.
Q. All right, sir. Now, what is your full time occupation, sir?
A. I am in the general insurance business.
Q. For how many years have you been Sales Supervisor at Statesboro?
A. I don't know exactly, but fifteen or twenty years.

Q. What are your duties, as such?

A. Well, a Sales Supervisor has a lot of duties. He prepares the sale cards. It is his duty to see that sales cards are carried out.

Q. Is that sale card for the rotation of sales?

[fol. 74] A. Rotation of sales, and it concerns the hours where sales begin and where sales move. He checks the buyers to see that you have qualified buyers on the sale. In fact, it is just to see that the market is run orderly.

Q. All right, and you are Sales Supervisor at this time on the Statesboro Market?

A. Yes, sir.

Q. Mr. Donaldson, how many baskets of tobacco would be regularly sold on the Statesboro Market per day?

A. 4400 baskets.

Q. Do you recall, of that 4400, what portion or how many the plaintiffs, Brannen, have in this case?

A. I would have to look. Brannen has two houses. He has, in one house, 751 and in the other house 647.

Q. All right, that's all right for now. Do you have before you a memorandum relating to the number of baskets he has to sell daily on the market?

A. Yes, sir.

Q. All right, sir?

A. That would be 1398.

Q. Now, with respect to the Statesboro Market, as a whole, Mr. Donaldson, on the first day of sale, this year, how many baskets were sold as against the 4400 allowed?

A. Well, the first day, Thursday, July 28th, 2715 baskets [fol. 75] were sold.

Q. On the second day of the market, how many baskets were sold?

A. 1174.

Q. On the third day of the market, how many baskets were sold?

A. On the third day, that would have been Monday, August 1st, 4358.

Q. Out of 4400 baskets?

A. Yes, sir.

Q. That was the first day the blue tags came off the tobacco—Monday?

A. Yes, sir.

Q. Then the next day, sir?

A. On August 2nd, which was Tuesday, was 4,074.

Q. All right, and read the next?

A. August 3rd, 4,219. August 4th, 4399. August 5th, which was Friday, of the second week, 3112.

Q. Now, that is about three-fourths of the available sale there. Is it unusual for a Friday sale to be fairly light?

A. On our market, we drop some on Friday, yes sir.

Q. All right, now go to the next sale day, which would be a Monday, sir?

A. Monday, which would be August 8th, 4400. Tuesday, [fol. 76] August 9th, 4400. Wednesday, August 10th, 4250. Thursday, August 11th, 4400. Friday, August 12th, 4107.

Q. Friday was somewhat a light sale?

A. Yes, sir.

Q. Do you have yesterday's figures, sir?

A. Baskets?

Q. Basket sales?

A. I have the figures, but they are not official. We sold full sale of 4400, but I do not have a ticket for that.

Q. On yesterday?

A. Yes, sir. We sold full force.

Q. Mr. Donaldson, you know one of the plaintiffs in this case, Guy Sutton, do you not?

A. Yes, sir.

Q. He has farmers' Warehouses in Statesboro?

A. Yes, sir.

Q. He is allotted, I believe, 622 baskets daily for sale?

A. Yes, sir.

Q. On the first day of sales, were you out there at his house?

A. Yes, sir.

Q. That was the opening day?

A. Yes, sir.

[fol. 77] Q. Did you know that there was a preponderate or almost exclusive blue tags in that house?

A. Yes, sir, it looked like it was all blue tags.

Q. Did he have a full quantity on hand to sell, that is, 622 baskets of tobacco?

A. Yes, sir.

Q. What happened in that sale, sir?

A. Well, the Government Grader actually graded 622 baskets on that sale, but only 177 baskets were sold.

Q. Why were not more sold?

A. Well, they passed them up in some instances, and then I observed them in some instances that the farmers did not want them sold, and in some instances the bids were low, or was rejected.

Q. You said they passed them up, who was that?

A. The buyers.

Q. Were some of these baskets not even bid upon, sir?

A. Yes, sir.

Q. Not even as much as a penny a basket?

A. Well, they didn't offer any bids on them.

Q. No bids were offered?

A. No, sir.

Q. Did you see any white tags of tobacco out there, sir? [fol. 78] A. I don't believe I saw any white tags at the Farmers' Warehouse.

Q. Now, with regard to the Sutton Warehouse on the second day of sale, was there a sale held there?

A. Yes, sir.

Q. What happened at that sale?

A. On the second day, Farmers Warehouse only sold 83 baskets.

Q. Out of 622 baskets?

A. 622 down on the floor to be sold.

Q. Did he have a full sale ready?

A. Yes, sir.

Q. But only 83 baskets were sold?

A. That's right, only 83 sold.

Q. What happened then? Did the sale stop again that day?

A. Well, I don't recall that it stopped. My recollection, I had to go to so many houses, I was running two sales at one time, but at that sale, if I am not badly mistaken, a farmer was given an opportunity, a grower, if he wanted his tobacco put up for sale, they would try, and under the conditions so many of them did not want their tobacco put up for sale, so they just passed it up.

Q. By the time of the second day, would you describe the

[fol. 79] market conditions in the Sutton Warehouse as being demoralized.

A. Well, he had 622 baskets of tobacco on the floor ready to sell and he only sold 83.

Q. All right, now, I will ask you with reference to Mr. Brannen, a plaintiff in this case; do you know Mr. Aulbert J. Brannen, Sr.?

A. Yes, sir.

Q. And his two sons, Aulbert J. Brannen, Jr., and Robert B. Brannen?

A. Yes, sir.

Q. They operate, I believe, three warehouses in Statesboro?

A. Yes, sir.

Q. On the first day of sale, were you in Mr. Aulbert Brannen's warehouse?

A. Yes, sir.

Q. Now, will you explain to the court what you saw there with reference to blue tags and white tags—predominately which?

A. Well, I will explain this to you: Brannen operates under two places on the sale card. Brannen one and three have a position, and Brannen's number two house has a position. Brannen's number two had very little, if any, blue tags on the floor. I saw very little blue tags of tobacco on [fol. 80] the floor. Now, Brannen's No. 1, where the sale was held that day, had some blue tags, much more than he had in No. 2, but Brannen's two houses did not have many blue tags in either house. In Warehouse No. 2 he didn't have any at all hardly.

Q. All right, sir. What happened, if anything, to the blue tag tobacco on Brannen's floor that first and second day?

A. Well, I am going to be frank about it, I missed part of that. We started the sale at Brannen's No. 2 and it was all white tobacco, all Georgia tobacco, and it was selling so fast, and the sale was running so smooth that I left it. On the last portion of that sale where they did sell a few piles of blue tag tobacco I did not notice. Now, on No. 1, I did observe there they sold some blue tagged tobacco.

Q. All right, sir. Since the blue tags went off, Mr. Donaldson, on the warehouse of Brannen and of Sutton—First,

with respect to Sutton's house, the one we started on, since the blue tags went off, did that tobacco then begin to sell and has it since then sold?

A. Oh, yes, in all of the houses.

Q. Has Sutton's Warehouse there, known as Farmers' Warehouse, had what we call a full sale, virtually a full sale each day?

A. Well, 622, but virtually that right on up.

[fol. 81] Q. No more of this 83 or 110?

A. No, sir. There were a couple of days there where he was short some maybe.

Q. Isn't it true that he was still handling virtually all tobaccos from the Carolinas on his floor?

A. Yes, sir. He sold a little Georgia tobacco now and th n.

Q. Now, do you know the plaintiff, Ed Wiggins, sir?

A. Yes, sir.

Q. He is a partner of the plaintiff, George Sugg, I believe?

A. Yes, sir.

Q. They are interested in the business at Statesboro known as The New Statesboro Warehouse?

A. Yes, sir.

Q. Would you state to the court as to the opening day and the second what—what they had in the way of tobacco, whether it was predominately blue or white tags?

A. The New Statesboro Warehouse had a little different situation.

Q. Explain it, sir?

A. They had a general mixture. They had part blue tags and part white tags. I don't know the percentage. I have no way of knowing except it could have been 50-50, or pretty [fol. 82] close to that.

Q. All right, sir, what happened in their sale on the first day?

A. On the first day, in the New Statesboro Warehouse, they were graded 788 baskets and they sold 524 baskets of tobacco.

Q. About two-thirds?

A. Yes, sir.

Q. Then what happened, after they had sold 524?

A. On that day?

Q. Yes, sir?

A. Well, that was during the sale, Mr. Neville, and some of it was passed or rejected but not at the conclusion of the sale.

Q. Now, on the second day, what happened to that warehouse?

A. The second day they sold 281 baskets.

Q. Out of an allotment of how many, sir?

A. Out of an allotment of 788.

Q. 281?

A. Yes, sir.

Q. Just about a third, is that right, sir?

A. Yes, sir, roughly that.

Q. Well, since that time, or since the blue tags came off the tobacco, what has happened to the New Statesboro [fol. 83] Warehouse of Wiggins and Sugg up there with respect to full sales?

A. It had full sales every day.

Q. Mr. Donaldson, I will ask you something about the prices on the Statesboro Market, if I may, with regard to the early days of the market and then the more recent days. Do you have figures in front of you?

A. Yes, sir.

Q. A memorandum, sir?

A. Yes, sir.

Q. Can you give us a figure of this blue tag sale that Sutton had the first day?

A. Yes, sir. I think I can.

Q. The Farmers' Warehouse the first day?

A. Do you want an average? Well, the first day the Farmers' Warehouse sold 17,648 pounds for $6,803.63, which averaged $38.55.

Mr. Knox: Your Honor, I would object to that unless he identifies the figures he is testifying from and knows that they are correct.

Q. Where did you get your figures, Mr. Donaldson?

A. I get my figures from the companies, from the buying companies, and I have checked with the Department of Agriculture, and I think that will bear it out.

Mr. Knox: What are you reading from now?

[fol. 84] The Witness: I am reading from a daily report, Supervisor's Daily Report.

Mr. Knox: Supervisor's Daily Report?

The Witness: Yes, sir, that I prepared myself. I got the figures from the companies.

Mr. Knox: From the companies?

The Witness: Yes, sir.

Mr. Knox: They furnish you with these reports each day?

The Witness: Yes, sir.

Mr. Knox: And you prepared it from that?

The Witness: Yes, sir.

Mr. Knox: All right, sir.

Q. On that average at Sutton's Warehouse on the first day was $38.55 a hundred pounds?

A. Yes, sir.

Q. Now, what has happened there now, more recently, since they have quit putting blue tags on the tobacco?

A. Well, do you want me to give it all to you, or do you wish to ask me some specific date?

Q. Well, do you have yesterday's?

A. No, sir. I do not.

Q. Do you have Friday's?

A. I have Friday's.

[fol. 85] Q. Let us have that, sir?

A. $49.04, Friday, August 12th.

Q. That was about ten dollars more per hundred pounds?

A. Yes, sir.

Q. You say that is still predominately Carolina tobacco?

A. Yes, sir. I don't want to give the impression now that he doesn't sell any Georgia tobacco, because he does, occasionally, but about 75 to 80 to 90 percent of it was Carolina tobacco.

Q. All right, sir. A moment ago we were talking about Wiggins and Sugg and the New Statesboro Warehouse, they had this mixed sale. Can you give us their figures for the opening day, what their average was?

A. $48.89.

Q. Can you give us their figure for yesterday or for Friday, sir?

A. Friday it was $55.96.

Q. About seven dollars more per hundred. Was it with one kind of a tag or two kind of tags?

A. Approximately.

Q. You say on the New Statesboro Warehouse of Wiggins and Sugg they had a full sale to make had it been bought?

A. All houses would have had, yes sir.

[fol. 86] Q. Were all Statesboro houses full the first day?

A. Yes, sir.

Mr. Neville: The witness is with you.

Cross examination.

By Mr. Knox:

Q. This is Mr. Donaldson, isn't it?

A. Yes, sir.

Q. Mr. Donaldson, from your testimony, it seems that certain houses in Statesboro are built and sell almost exclusively tobacco from the Carolinas and that region, is that right, sir?

A. Well, I will say this, Mr. Knox: Some houses there sell more than others. I will put it what way. I don't know.

Q. In other words, your testimony is that two or three of them there sell practically 80 to 90 percent from the Carolinas?

A. Well, I mentioned one, is all I have mentioned.

Q. Now, do you have your figures on the opening day's sales, your averages?

A. Opening day?

Q. Yes, sir.

A. Yes, sir.

[fol. 87] Q. Would you take a house where they sell predominately Type 14 tobacco?

A. All right.

Q. Are those figures for your opening day there, are they broken down to show the price that Type 14 Tobacco brought, sir?

A. You mean the difference in the Type 14 and the other?

Q. Yes, sir?

A. No, sir, they are not. There is no way to get that.

Q. You didn't attempt to do that on your figures there?

A. I don't know how I would get that.

Q. You know that the first few days, under this blue tag law, the companies were required to report the poundage and the price average of Type 14 tobacco and other tobaccos?

A. I have got it here somewhere, I think. That's the second week. I think you have got it on your desk.

Q. Now, let's take the same warehouses that you took awhile ago and show the average price on the blue tag tobacco for the first day—for Type 14 tobacco?

A. Farmers' Warehouse?

Q. Yes, sir, Type 14 tobacco?

[fol. 88] A. They didn't have any.

Q. They didn't have any?

A. Not according to this.

Q. How about another house?

A. Well, you mean just pick any one?

Q. Yes, anyone that had Type 14 tobacco?

A. Well, let's take this New Statesboro, Type 14—do you want the average?

Q. Yes?

A. Type 14 was $48.49. Now, let me say this: This was the first two days. These are the Agriculture figures, the Department of Agriculture figures, that I am reading from.

Q. What was the average on the other types of tobacco for the first two days, in that same warehouse now?

A. $23.05.

Q. $23.05?

A. Yes, sir.

Q. Now, Mr. Donaldson, getting back to this tobacco that you said was not sold—exactly what do you mean it wasn't sold? Was it rejected or turned down, or what?

A. Well, I don't know whether to use the word rejected or not. All I can tell you is that they didn't buy it, they didn't bid on it.

Q. Did it go into the Stabilization Program?

[fol. 89] A. No, sir, it didn't do anything. Now, some of it did, but some of it was just what we call "passed".

Q. Wasn't all the tobacco just prior to the sale graded by the Department of Agriculture Grader?

A. Yes, sir.

Q. Isn't it true, sir, that when that tobacco is graded by him, as required by law, then the Stabilization supports that tobacco according to the grade price assigned thereto?

A. Yes, sir.

Q. Now, isn't it further true, sir, that the blue tag law, the Georgia Identification Act, has no effect whatsoever on the price that the Stabilization supports tobacco?

A. That is my understanding, yes, sir.

Q. What happened on this tobacco is, since you said it didn't sell, it was either sold, or went into Stabilization, or was turned down by the farmers, is that correct, sir?

A. No. I don't know whether you understand tobacco auctions or not. The fact that the Government grader put a grade on it doesn't sell the tobacco. If you pass it up, it is just sitting out there.

Q. Who passed it up? Didn't the warehouseman start the sale on it and put an opening bid on it?

A. He did on some, yes.

Q. He did on some of it?

[fol. 90] A. Yes, sir.

Q. Well, on that then is the opening bid that he made?

A. That went into Stabilization.

Q. That went into Stabilization?

A. Yes, sir.

Q. What you are saying, when you say the tobacco wasn't sold, was because the warehouseman wouldn't buy it or wouldn't, is that correct, sir?

A. He couldn't get a bid.

Q. He didn't try. He couldn't get none, if he didn't try, could he, Mr. Donaldson? So, actually what you are saying is the reason that tobacco didn't sell on those particular dates was because the warehouseman didn't offer it for sale?

A. They offered it where a farmer agreed to let it go.

Q. Mr. Donaldson, there are a lot of factors that determine the time and matters that tobacco producers offer their tobacco for sale, isn't there?

A. Yes, sir.

Q. One of the main things that determines the time is the time that their warehouseman advises them as to what time to offer it? A lot of farmers consult with their warehousemen and they are inclined to sell their tobacco at the time that he thinks it is proper, isn't that true, sir?

[fol. 91] A. I guess that's true.

Q. There are various other factors. Farmers might desire to change from one market to another?

A. That's true.

Q. Or change from one warehouse to another?

A. Yes.

Q. Now, is there any way that you can state from your own knowledge that the Georgia Identification Law, the Blue Tag Law, had any direct bearing or effect on the volume of tobacco that was on the Statesboro Market the first two days?

A. No, sir. It didn't have any bearing on the amount of tobacco there, but it had a bearing on the amount of tobacco that was sold.

Q. So, actually, the law had nothing to do with the amount of tobacco that was on the market the first two days, that was your testimony?

A. No, but the reason it didn't was because it was already there. In other words, the first two days there, the tobacco was there on the market, and the only—

Q. (Interrupting) That's right. In other words, the first two days the tobacco was already there on the market and the only reason it wasn't sold was because the warehouseman didn't offer it for sale, or the farmers withdrew it, is that correct?

[fol. 92] A. They didn't let them sell it. That is the only way I know how to put it. I am not an expert on those matters.

Q. Were you there, sir?

A. Yes, sir. I was in and out.

Q. You were in and out the houses?

A. Yes, sir.

Q. And you heard the farmers say to the warehouseman: "This is my tobacco", or "this is my pile of tobacco, don't sell it"?

A. In a good many instances they would tell him that

they didn't want it sold under the circumstances, that he didn't want his tobacco sold.

Q. Now, you could hear some of them say that?

A. Yes, sir.

Q. You didn't hear all of them?

A. No, and I couldn't identify the farmers who said it.

Q. You couldn't actually testify to the number or what bearing it had on it?

A. No.

Q. All right, sir. The grade was on both the blue tag and the white tag tobacco alike, wasn't it, sir?

A. Yes, sir.

Q. It was on both tags?

[fol. 93] A. As far as I know, that is not in my field.

Q. But as far as you know, the grades were on it?

A. Yes, sir.

Q. All right, sir.

Redirect examination.

By Mr. Neville:

Q. Mr. Donaldson, in the other fourteen to nineteen years, or whatever it is that you have been on the market, have you ever seen a performance like 1960, concerning this out-of-state tobacco being walked by and not bid on?

A. Well, naturally, we had never had anything like that before, no sir.

Q. Well, a little more recent history—last year, specifically?

A. Well, last year was a very smooth operating year, Mr. Neville. We sold 4400 baskets every day right down the line. They were smooth orderly sales.

Q. Last year, on the market, did you determine or see that others had determined there was such a categorical difference in Georgia and Carolina tobacco?

A. State that again, please, sir.

Q. Last year did you see that there was such a cate-

[fol. 94] gorical difference in the Carolina and Georgia tobacco?

A. There had not been any difference, no sir.

Q. How about before that?

A. Well, we had been selling all of these years, right along, you know. I couldn't tell any difference whatsoever. I am not a tobacco expert, however.

Q. They had the same government grades?

A. The same government grades, and the same bidding.

Q. The same as this year?

A. Yes, sir.

Q. Many of the buyers were the same people, weren't they?

A. On our market, yes sir.

Q. All right. Now, with respect to two other firms in Statesboro—there are five and we have mentioned three. We have mentioned Brannen and the New Statesboro Warehouse and Farmers. How about the Cobb & Foxall firm? What did they do on the opening day? Did they have mixed tobacco, that is blue tag and white tag tobacco?

A. Yes, sir, they had some of both.

Q. They were allowed to sell, I believe, about 900 or so baskets?

A. 931.

Q. How much did they sell?

[fol. 95] A. 510 baskets of tobacco.

Q. Can you explain that, sir, on opening day, this year?

A. Well, I tried to explain it awhile ago.

Q. Would the same reasons apply as applied to the others?

A. Yes, sir.

Q. Now, the remaining firm, the Sheppard firm, what happened to them on the first day? First, did they have mixed tobacco?

A. Yes, sir, they did.

Q. How many baskets are they allowed to sell?

A. On opening day, this year, the government graded 661 baskets and they sold 311 baskets of tobacco.

Q. Would the same reasons apply to Sheppard as to the other warehouses?

A. Yes, sir.

Q. Or did not sell their full sale?

A. Yes, sir.

Q. Were you in Sheppard's warehouse that opening day?

A. Yes, sir.

Q. They had mixed tobacco, didn't they?

A. Yes, sir.

[fol. 96] Q. As well as Cobb & Foxall?

A. Yes, sir.

Q. With respect to those two houses, what has happened as recently as Friday?

A. On Friday, Cobb & Foxall, had an average of $53.43.

Q. What did they have on the opening day, sir?

A. 49.77.

Q. They were about four dollars better last Friday?

A. Yes, sir.

Q. How about Sheppard on the opening day and Friday?

A. Sheppard, on the opening day, I don't believe I have got that exactly, I want to be positive about it. On the opening day Sheppard had an average of $55.10.

Q. $55.10?

A. Yes, sir, and on Friday, it was $46.60.

Q. He was down at that time?

A. Yes, sir.

Q. On his opening day, what did he do—sell some Georgia tobacco, and sold that before they got to the blue tags?

A. Sheppard's Warehouse, on opening day, they sold about three rows of Georgia tobacco and then they quit. They started selling the blue tag tobacco, but he soon stopped his sales.

[fol. 97] Q. Why?

A. I don't know.

Q. Well, was it being bought?

A. He wasn't getting the bids. I don't know, but I can give an opinion. I don't know why he stopped.

Q. All right, sir.

Recross examination.

By Mr. Knox:

Q. Prior to this year there had never been any way that the buyers could identify Type 14 Tobacco from any other tobacco on the floor, was there?

A. As far as I know, no.

Q. Now, you have your figures there?

A. Yes, I have them.

Q. You said Sheppard sold mostly Type 14 tobacco?

A. Yes, sir.

Q. Now, the only reason that the tobacco was not sold was that the warehouseman stopped the sale, or the producers told them to pass his or their tobacco and they walked on by?

A. Well, we had some warehouses that operated different from others, Mr. Knox. Growers were given an opportunity if he wanted to sell his tobacco. He could sell it or not sell [fol. 98] it. In most instances they did not want to.

Q. In other words, though, the buyers were there and ready, and the warehouseman was there, and if it was sold by him, of course, it went into the Stabilization Program, or was turned down, or delivered to the company?

A. That's right. Let's be fair about it now. The buyers were bidding such low prices and that slowed the thing down and that is the reason the growers began to say that they didn't want to sell it.

Q. The blue tag identification law, as far as that is concerned, in connection with that, only identifies the type of tobacco, is that not true, sir?

A. That's true, yes sir.

Mr. Knox: That's all.

Judge Jones: Do I understand you to testify that most of the tobacco, before the tags were put on and after they came off, sold from Farmers' Warehouse, was Carolina tobacco?

A. Yes, sir.

Judge Jones: If you had knowledge that this tobacco, after the tag came off, was Carolina tobacco, was that same knowledge available to the buyers?

The Witness: Yes, sir.

Judge Jones: The buyers knew, or could have ascertained if it was Carolina tobacco, whether it was tagged [fol. 99] blue or white, or without a tag?

The Witness: Well, I believe the buyers are just as smart as I am, and they knew exactly what it was, I feel sure.

Judge Simpson: You specified, as I understood, that Friday, August 12th, there was an average of $49.04, but that it was still predominately South Carolina tobacco?

The Witness: Yes, sir.

Judge Simpson: All right. Judge Jones' question goes to that. I would just like to know the source of your information that it was still predominately South Carolina tobacco, if it was not tagged?

The Witness: I don't have any proof, but I just know that is all they sell there.

Judge Simpson: All right.

Recross examination.

By Mr. Knox:

Q. You know, from your observation, in seeing the South Carolina trucks there?

A. Yes, sir.

Q. Actually, you don't know?

A. No more than what I told you.

Judge Scarlett: You didn't testify here last Friday?

[fol. 100] The Witness: No, sir.

Judge Scarlett: As I recall, someone testified about fifty percent.

The Witness: Well, that meant for the entire market, I think, Judge Scarlett.

Judge Scarlett: All right.

Judge Jones: The Court will be in recess for five minutes.

Note: At this point a recess was had from 3:25, P.M., until 3:28, P.M., of the same day at which time the proceedings were resumed as appears on the next page.

[fol. 101] William Hussey, Jr., sworn for the Plaintiffs, testified.

Direct examination.

By Mr. Neville:

Q. Mr. Hussey, what is your occupation, sir?

A. Tobacco Warehouse Operator.

Q. Are you one of the plaintiffs in this case?

A. Yes, sir.

Q. You operate a tobacco warehouse in Swainsboro, Georgia?

A. Yes, sir.

Q. Known as the Swainsboro Tobacco Warehouse Company?

A. That's correct.

Q. For how many years have you operated that warehouse there, sir?

A. Six years.

Q. Is this the sixth year?

A. Yes, sir.

Q. Mr. Hussey, were you one of the original operators of a warehouse in Swainsboro, Georgia?

A. Yes, sir.

Q. You went there the first year that that market had a warehouse?

A. Yes, sir.

Q. Where is your home, sir?

[fol. 102] A. Wallace, North Carolina.

Q. Mr. Hussey, with regard to the warehouseman relationship to his customers or growers will you explain to the court what the duties of the warehouseman are?

A. I am representing the grower in the marketing of his tobacco. He brings it in and looks to me to see that his tobacco is weighed correctly, placed on the floor in a manner that it will be best displayed for sale, and I will do the best I can to get him the full market value for each pile of tobacco, and his bills will be figured as promptly and efficiently as I can and he gets his money.

Q. Now, with reference to the Swainsboro Market that you operated there, during the last five years, before 1960, what had been the principal crop that you had sold, that is, as to where it was from?

A. Well, it has been divided up very much between Carolina and Georgia, I would say—the big percentage of Georgia tobacco there.

Q. About what percentage of South Carolina and North Carolina tobacco?

A. Last year it was about 50 percent.

Q. Mr. Hussey, I will ask you this: As a warehouseman have you ever been an independent buyer or speculator?

A. I have before, yes, sir.

[fol. 103] Q. You had bought tobacco?

A. Yes, sir.

Q. How old are you, sir?

A. 35.

Q. And, how many years have you been engaged in the tobacco trade, one way or the other?

A. I was raised in it. It is the only business that I have ever been in. I would say eighteen or twenty years.

Q. Mr. Hussey, in the years previous to 1960, was there ever on the Swainsboro Market any difference in the way tobacco sold from the Carolinas, on the one hand, and Georgia, on the other hand, grade for grade?

A. No, sir, I didn't think so.

Q. I will ask you, as a tobacco man, would there be any good reason for selling at different prices?

A. I can't think of any reason, sir.

Q. I am speaking of corresponding grades, now?

A. I couldn't see there was any difference, because you offer the same varieties, grown under the same conditions, and the same types of tobacco, and I can't see any reason for there to be any difference.

Q. All right, this year, when the blue tags were put on the out-of-state tobacco, that is, from the Carolinas, I am speaking of, and the white tags were put on the Georgia [fol. 104] tobacco, was there a difference on your market?

A. Yes, sir.

Q. Was it a noticeable difference?

A. Yes, sir.

Q. I would like for you to relate to the court what happened on your first day of sale?

A. Well, we started off with Georgia tobacco, about the first eight rows were all Georgia tobacco, no blue tags on it, and in the middle of the row we hit our first crop of out-of-state tobacco, but before that they asked me to identify or call out the blue tickets and I wouldn't do it, and when they got into the first crop of these blue tickets, I had not said anything about it, and one of the companies bought the pile of tobacco at $61.00 a hundred, and the sale stopped, and somebody called his attention to the fact that he had bought a pile of blue ticket tobacco, and he said: "Oh,

I can't buy blue ticket tobacco", and someone nudged him and said: "Don't you mean that tobacco is wet"? He said: "Yes, that's it. It is too high an order for me", and so he had me to sell it over; and we called the government grader over to reinspect it and to check the grades and see if he had the right grade on it and if the tobacco was all right, and he O'kayed that. Then we started on down the row to the next pile of tobacco and nobody would bid on it, and the pile of tobacco was finally passed, and at the end of [fol. 105] the row I called the Government Grader back and told him to go back and reinspect it and see if it would go to the Stabilization and he went back and O'kayed it and it did go to the Stabilization.

Q. Mr. Hussey, I hand you here some tickets. Do these tickets relate to that transaction on that first day of sale there?

A. Yes, sir.

Q. Explain them, please sir?

Mr. Knox: If the Court please, may we have that identified by the Court Reporter so that we can refer to it.

Judge Jones: Let them be identified by the witness.

The Witness: These coupons were placed on each pile of tobacco to identify the crop number, the farmer's tobacco and the government grade, and this is the very first pile of blue card tobacco that we hit on that morning sale and sold for $61.00, and this is the company that bought it, his initials, so we know who got it, and so when he saw this blue ticket he scratched it out and I called the government inspector to come back and regrade this tobacco, and he O'kayed it and it went to the Stabilization. After that, we hit the next crop, and when I started the pile of tobacco no one would bid on it, and it was marked "passed". And, after that, we called the government grader back again and he O'kayed it again that his government grading was acceptable to the government, and all of these were done the [fol. 106] same way—it was the same thing, and the government accepted all of them. None of the companies would bid anything.

Judge Jones: Let that be marked for identification as Plaintiffs' exhibit.

Note: Whereupon said document was then marked for identification as Plaintiffs' Exhibit No. 1.

Judge Jones: Are you offering it into evidence?

Mr. Neville: Yes, Your Honor.

Judge Jones: Any objections to it?

Mr. Knox: We have no objections, but we would like to look at them.

Judge Jones: Then they are received and filed in evidence.

Q. Mr. Hussey, I hand you here two items, will you state to the court what they are, sir?

A. These are tobacco warehouse tickets. This is the white one. We always use down here "a hundred percent". These are the ones that we used on the Georgia tobacco, starting the first two days of the sale.

Q. On this white one, let me ask you this: These words "Type 14" have they always been on the white tags?

A. I can't recall.

Q. Now, that one there is a blue one?

A. Yes, sir.

[fol. 107] Q. What was that one for?

A. That was for identifying out-of-state tobacco, or other than Type 14.

Q. All right, Mr. Hussey, I will ask you, for the sake of the record—do you have a pencil there, Mr. Hussey?

A. Yes, sir.

Q. I will ask you to fill that out just as it is down at the Warehouse preparatory for sale, so that the data will be typical of the data shown on the market?

A. All right.

Q. Now, this is a red pencil I hand you, would that be the one used by the grader?

A. Yes, sir. If it goes to the government support price they use this red mark to put the government loan on it, the support price.

Q. Will you mark it in that fashion, sir, put the red pencil there, if it is proper to use the red pencil—but first, will you put the other price on it?

A. The government grader puts it on there. I don't.

Q. All right?

A. The government grader puts that on there. I believe it is "B-4-F" that carries the $57.00 support price.

Q. All right, this is just an example that you are making there?

[fol. 108] A. Yes, sir.

Q. Now, what you have put on there in red indicates what?

A. The support price. The Stabilization Corporation gets it by buying the pile of tobacco.

Q. With the blue tag, that would be handled in the same fashion, is that correct?

A. Yes, sir.

Q. In the same fashion?

A. Yes.

Mr. Neville: If I may approach the bench, I would like to pass this up to Your Honors to see it.

Judge Jones: Very well.

Q. Mr. Hussey, this other tag, this blue tag, it would be accomplished in the same fashion?

A. Yes, sir.

Q. The difference being the blue tag?

A. That's right.

Q. I believe that blue tag that you hold there has no type of tobacco of any sort printed on it, has it?

A. No, sir.

Q. I will ask you this: Where were these furnished from, and who printed them up?

A. Seyman Printer in Durham, North Carolina, printed [fol. 109] it.

Q. Did you give him the pattern to use?

A. No, sir, and I certainly wouldn't have give it to him.

Q. Do you know where he obtained that?

A. I imagine from the Agriculture Department of Georgia. I don't know, sir.

Mr. Neville: We call attention of the Court at this time that on this white tag, in the upper right-hand corner, it reads: "Tobacco Inspection Certificate", and there are two

lines typed there saying: "This tobacco inspected under the Tobacco Inspection Act by the U. S. Department of Agriculture", certified to be controlling, and under there is printed in the words: "Type 14", grade blank, and that grading then is accomplished by the government grader. I call attention to it for this reason: Type 14 is not properly related to the language of the certificate of the government grader, but this Type 14, as appears on here, has been used in this market. We would like to introduce this into evidence. Would you like to examine it?

Judge Jones: Let it be introduced in evidence as the next exhibit.

Q. Mr. Hussey, I will ask you with respect to this card I hold in my hand, what is this, sir?

A. That is a table of government grades and loan support [fol. 110] price.

Mr. Neville: All right. Is there any objections to the introduction of this?

Mr. Knox: No, sir.

Mr. Neville: We would like to introduce as plaintiffs' exhibit, an official schedule of loan values by the U. S. Standard Grade. It shows on the face of it approximately 168 government grades.

Judge Jones: Without objection it will be received and filed in evidence.

Note: Thereupon said document was received in evidence and marked for identification as Plaintiff's Exhibit No. 12.

Judge Simpson: Mr. Neville, the blue tickets have never been offered, as I understand.

Mr. Neville: I would like to offer it at this time, Your Honor, if I may.

Mr. Knox: No objection, your Honor.

Judge Jones: Let it be received and filed.

Note: (Whereupon, said exhibit was then received in evidence and marked for identification as Plaintiff's Exhibit 13.)

Q. Mr. Hussey, now, as a warehouseman, when a customer brings tobacco there to be sold, you have stated something

of your duties, but what is done with that tobacco specifically?

A. First, he drives in and waits his turn in line, and when [fol. 111] he gets to the scale we furnish men to unload, it goes to the scale, and he takes out his marketing card and he gives his name and address and identifies himself, and then that tobacco is weighed, with a ticket placed on it, and then it is put in line for sale, as the next sale comes up.

Q. Now, when the time comes for an auction sale, are there at that sale, sir, as a warehouseman?

A. Yes, sir.

Q. Also, present at that sale would be the auctioneer and buyers?

A. Yes, sir.

Q. And various other personnel?

A. Yes, sir.

Q. Making and keeping records and the like?

A. Yes, sir.

Q. Explain to the court what the progress of this sale is? Explain how it is carried on?

A. Well, the first thing, after the tobacco is dumped out of the sheets it is delivered in, the government grader goes along ahead of the sale and he puts whatever their standards or grades are on the piles of tobacco, and then I come along, as the man who manages the sale, and I give the auctioneer a starting bid, and he cries that bid until he can get a company to accept it, and if he doesn't get anybody he lowers it until he gets somebody to bid on it, [fol. 112] and if they think it is worth more than that they go up, and then if that pile is sold, we start at the next one, and after he sells that the ticker marker marks the price and the company and the grade he puts it in, and then the man behind him picks it up, picks it up and sends the information into the office so the farmer can get paid for it.

Judge Simpson: Those are your employees—the ticket marker and the man who books it?

The Witness: Yes, sir, and the auctioneer.

Q. Mr. Hussey, for the years that you have been in the tobacco business, which you say has been a good many, has

it been the practice of tobacco growers to carry their tobacco to distant markets to sell it?

A. Yes, sir.

Q. From state to state?

A. Yes, sir. We have had tobacco that left North Carolina and went to Virginia, and we have had tobacco from Virginia to come to our market, and a lot of our tobacco goes to South Carolina and the South Carolina tobacco moves to the Wallace Market and comes down to Georgia, and I have heard of Georgia tobacco coming to South Carolina; and I know we have sold tobacco out of Western Missouri and Louisville, Kentucky, and it has always been the practice of the farmer to sell wherever he thought he could get the best price for his particular type or grade of [fol. 113] tobacco.

Q. Now, our Georgia Market opens earlier by some two weeks than the South Carolina Market, isn't that true, sir?

A. Yes, sir.

Q. Farmers having their tobacco ready for marketing would have an earlier source of money in Georgia than they would in South Carolina?

A. Yes, sir. A lot of them use that for the reason to get money to finish housing their crop.

Q. To finish housing their crop, you mean to pay labor with?

A. Yes, sir.

Q. To finish curing and gathering their crops?

A. Yes, sir.

Q. The compensation you get as a warehouseman depends on the gross sales made for your customers, is that correct?

A. Yes, sir.

Q. With a better price, your commission is higher, and with a poorer price it is lower, is that right?

A. That's right.

Q. Now, the number of pounds brought into your market, in a sense, controls some of that?

A. Yes, sir.

[fol. 114] Q. Do you recall what your poundage was sold the first day of sale this year as compared to last year?

A. Yes, sir. On the first day, last year, we sold 189,100

pounds for $91,360.96. The first day, this year, we sold 158,348 pounds for $73,639.23.

Q. On the second day of sale, this year, what was your experience?

A. We sold 94,918 pounds for $38,964.01.

Q. Was that smaller than last year in pounds and dollars, sir?

A. Yes, sir. I sold 205,206 pounds for $107,767.93 the second day last year.

Q. A little than half—give me that figure again.

A. I sold 205,206 pounds for $107,767.93 last year on the second day.

Q. Then it was a little less than half this year's second day, compared to last year's second day?

A. Yes, sir.

Q. In pounds? Can you account for what made that drop, sir?

A. Out-of-state customers wouldn't bring tobacco as long as the blue tag was on the tobacco.

Q. Without going into the conversations you had with people not present, did you communicate with the people in [fol. 115] the Carolinas who were your customers?

A. Yes, sir.

Q. Was that communication in regard to the sale of their tobacco on the Georgia Market?

A. Yes, sir, it was.

Q. On the basis of what happened, concerning the blue tag, was it determined not to sell a great deal of that Carolina tobacco that had been planned for sale?

A. After they heard how our market was doing they called up and cancelled space that was already booked, and wouldn't deliver the tobacco over the week end for which space had already been booked for.

Q. Was booking down in order to insure orderly processing of the market or out-put?

A. Well, I put that Carolina tobacco, in a sense, so I wouldn't run the Georgia Market over it.

Mr. Neville: All right, sir. Witness is with you.

Cross examination.

By Mr. Knox:

Q. Mr. Hussey, I believe you testified that you lived in Wallace, North Carolina?

A. That's correct.

[fol. 116] Q. Do you operate a tobacco warehouse there in Wallace, North Carolina?

A. I am connected with one there. I work for my father in North Carolina.

Q. You are connected with the tobacco interest up there in North Carolina?

A. Yes, sir.

Q. Do you work with any other tobacco market, other than Georgia and North Carolina?

A. Yes, sir.

Q. Where is that, sir?

A. I was in Gate City, Virginia, last year.

Q. In Gate City, Virginia?

A. Yes, sir.

Q. Now, it is stipulated by your counsel here that approximately 50 percent of the tobacco that you sell on your Swainsboro Market is type other than Type 14, is that correct?

A. Well, about 50 percent of the tobacco that I sold came from out of the State of Georgia.

Q. About 50 percent of it was Type 14, and about 50 percent was other than Type 14, is that correct?

A. Yes, sir.

Q. That's right, isn't it?

A. If Type 14 means it is Georgia tobacco, yes sir.

[fol. 117] Q. Have you ever heard of the black shank or granville disease that they have up in the Carolinas?

A. I think that is in all belts. Yes, sir, I have heard of it.

Q. You have heard of it in North Carolina and South Carolina?

A. Yes, sir.

Q. Isn't it true, Mr. Hussey, that the black-shank or granville disease make it impossible in North and South Carolina to produce the old line varieties and as a result they have started producing a disease resisting type of tobacco?

A. No, sir, not entirely. Some still produce that. There are a lot of it grown in our particular county.

Q. You do admit and concede that the black-shank disease and the granville disease has developed in these areas up there and for that reason many areas cannot produce the old line varieties?

A. I know that some of that old line is not planted, and that some farmers attribute that to the cause of it. I am not in that end of it, sir.

Q. Have you ever heard of the black-shank or granville disease in Georgia?

A. Yes, sir.

Q. Where at, sir?

[fol. 118] A. Well, I heard Mr. Spearman talking about it and I believe they said in Emanuel County.

Q. You have heard of the disease in Emanuel County?

A. Yes, sir.

Mr. Neville: Your Honors, we would like to be heard in regard to this. Counsel is going into a matter that is interesting to the plaintiffs, but nowhere is it raised in the pleadings, nor is it mentioned in the Act that is being defended here, or the State Act we are attacking. We doubt that this particular line would be relevant to the constitutionality of the Act we are considering here.

Judge Jones: Well, I wondered what some of the questions you asked had to do with the case too, so I think we will let him go along, if he doesn't go too far, and too long.

Mr. Knox: I will leave it right there, may it please the Court.

Q. Mr. Hussey, during the time that you have been operating your Swainsboro Market you have bought tobacco for your own account, have you not?

A. Yes, sir.

Q. What do you do with that tobacco that you buy there, sir?

A. Resell it.

Q. Where do you resell it at?

[fol. 119] A. Swainsboro.

Q. Have you ever resold any of that tobacco that you

bought there on the Swainsboro Market on any other market in Georgia?

A. Yes, sir.

Q. Where did you resell that at?

A. I sold some in Vidalia, and some in Nashville.

Q. Some in Nashville. Now, Nashville is down in the southern end of the state where they sell very little, if any, Type 14—or other than Type 14 tobacco, is that true, sir?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Mr. Hussey, the market that you work at in Wallace, North Carolina, do you have a card very similar to this?

A. Yes, sir.

Q. On the card that you have in Wallace, North Carolina, what is typed in that place right there instead of Type 14? (indicating to witness on card)

A. I couldn't say about that, I don't know.

Q. Is there a type placed there?

A. I couldn't tell you, because I never have noticed it that close.

Q. You have never noticed it?

[fol. 120] A. No, sir.

Q. You have been working how long on that market?

A. I have been at it nearly all of my life, but I had never noticed any Type 14 tobacco. That is Uncle Sam's Corner, and I don't have any reason to measure that.

Q. Let me ask you this: Isn't it true that the government grader grades the pile of tobacco just the same regardless of whether there is a blue ticket on it or a white ticket on it, isn't that true?

A. That's my understanding.

Q. Isn't it further true, sir, that the Stabilization supports the pile of tobacco just the same and at the same price regardless of whether there is a blue ticket on it or a white ticket on it?

A. Yes, sir.

Q. Now, in the event, just for the sake of argument, say, that in Wallace, North Carolina, you have Type 12, where you have Type 14, do you think that could very well be possible?

Judge Jones: Counsel, he says that he doesn't know, and I think we are getting a little far afield anyway.

Mr. Knox: The purpose, may it please the Court, is merely to show, and I can show by other evidence that in Wallace, North Carolina, Type 12 is placed there, sir. If the farmer from North Carolina sells his tobacco there, [fol. 121] sir, he sells it as Type 12, and it is identified as such.

Judge Jones: We don't have any case here involving sales of tobacco in North Carolina.

Mr. Knox: The sole purpose of this, if the Court pleases, is merely to show that when this tobacco is brought into Georgia and the purpose of the blue identification is to quickly identify it as to Type.

Q. Mr. Hussey, the only point in the blue tag and the white tag is to merely identify the tobacco as to type, isn't that true?

A. I don't know, sir.

Q. You don't know?

A. No, sir.

Q. All right.

A. Your Honor, I would like to say something to the Court, if you please.

Judge Scarlett: Go ahead.

The Witness: You don't mind?

Judge Jones: Stick to the facts.

The Witness: Six years ago, I came down to Swainsboro, Georgia, and two hundred farmers and people in the community organized a warehouse, and I have operated there for six years, and it looked like this year, without that Carolina tobacco, we were going to be put out of business, and [fol. 122] the farmers, a great many of them, asked me to try to do something to save that market by trying to get the blue tag lifted, was our way of trying to save the market.

Redirect examination.

By Mr. Neville:

Q. Mr. Hussey, I would like to hand you here five small bundles of tobacco. Will you state whether or not that came out of your warehouse at Swainsboro?

A. Yes, sir, it did come out of there.

Q. And will you state whether or not some of that is from the Carolinas and some of it is from Georgia?

A. That's correct.

Q. Did it all come from parcels having identical government grading?

A. Yes, sir.

Q. What was that government grade, sir?

A. B-4-F.

Q. All right, sir.

Recross examination.

By Mr. Knox:

Q. Which is from North Carolina and which is from [fol. 123] Georgia?

A. I don't know.

Q. You don't know?

A. No, sir.

Mr. Knox: That's all.

Mr. Neville: We have no further questions, Your Honor.

Judge Jones: All right, the witness may step down. Call your next witness.

Mr. Neville: Mr. Guy Sutton, Sr.

[fol. 124] Guy Sutton, Sr., sworn for the plaintiffs, testified.

Direct examination.

By Mr. Neville:

Q. Will you state your name, please sir?

A. Guy Sutton.

Q. Where is your home, Mr. Sutton?

A. Greenville, North Carolina.

Q. Do you operate a tobacco warehouse in Statesboro, Georgia?

A. Statesboro, Georgia, yes sir.

Q. How many years have you been on the Statesboro Market?

A. Ten, I believe, ten or twelve. I wouldn't say exactly.

Q. What age are you, Mr. Sutton?

A. I operate the Farmers Tobacco Warehouse.

Q. I say, how old are you?

A. I will soon be 61 years old.

Q. For how many years have you been engaged in tobacco of one kind or another?

A. I have raised tobacco all of my life, grow tobacco. I have been on the market about twelve years.

Q. Are you the newest operator on the Statesboro Market?

A. I didn't understand you.

[fol. 125] Q. Are you the newest warehouse on the Statesboro Market?

A. Yes, sir, I think so.

Q. Now, you have the Farmers Warehouse?

A. Yes, sir.

Q. At Statesboro, Georgia?

A. Yes.

Q. I would like for you to explain to the Court what happened on this year's tobacco sales compared to last year for corresponding days?

A. Last year, 1959, I sold 129,118 pounds.

Q. Talk out a little louder, please, sir?

A. In 1959, I sold 129,118 pounds of tobacco for the sum of $71,303.19, at an average of $55.22.

Q. Was that the first day, sir?

A. The first two days in 1959, yes sir.

Q. All right. Now, how about this year, sir?

A. Well, this year, 1960, I sold 28,258 pounds of tobacco for $12,429.33, at an average of $43.99. That was the first two days of 1960.

Q. 28,258 pounds of tobacco for $12,429.33 on the first two days of 1960?

A. Yes, sir.

Q. Mr. Sutton, will you describe to the court what hap-
[fol. 126] pened at your warehouse the first two days this year?

A. Yes, sir.

Q. Concerning whether the tobacco was bought or not bought?

A. Well, we tried to sell it and we couldn't. Some of them turned over the tag and went over part of it—just whatever the farmers wanted me to sell that is what I sold. The first two rows they all turned tags on me, covered it up and it stayed there. We went over the warehouse and sold what little the farmers would like to be sold on that day, after it was graded.

Q. Picking about in there?

A. Picking about in the warehouse. The second day we tried it, and done the same thing.

Q. The second day?

A. Yes, sir, the second day we tried it and done the same thing. Some of the farmers took up their tobacco and moved it back home. Monday, we finished selling what we had on the floor.

Q. What you started out to sell on Thursday, you finally got it sold on Monday?

A. We finally got it sold on Monday what we had on the floor for sale Thursday and what we had on there for Friday.

[fol. 127] Q. Have your operations improved since the blue tag has been taken off?

A. Yes, sir. We had one of the best sales yesterday that we have had this year.

Q. What was your average?

A. How you mean?

Q. What was your average a pound?

A. Between 54 and 57 cents, I think, yesterday, the best I can recall. I can't recall exactly what it was.

Q. Mr. Sutton, do you know why this tobacco was not bought—on the blue tag?

A. No, sir, I don't know why, but it wasn't bought on the blue tag. It just wouldn't sell on the blue tag.

Q. Well, last year, sir, was the Carolina tobacco bought very easily, or sold very easily, last year?

A. Yes, sir. It sold very good.

Q. Was there any difference shown in it last year?

A. This year? Yes, sir, after they put the blue card on it.

Q. All right; but between Carolina tobacco and Georgia tobacco, last year, was it all treated alike?

A. All treated alike. All had the same tags on them and it was all treated alike.

Q. And this year it was not?

[fol. 128] A. It was not, no, sir, not with a blue tag on one and a white tag on the other.

Q. Mr. Sutton, awhile ago you said that it took you until Monday to sell out what you started with on Thursday?

A. Yes, sir. That was my sale for Thursday, and it was sold on Monday, except what the people had taken up and carried home. I sell 622 piles per day and I had probably 800 piles on the floor for Thursday—or Thursday and Friday, see, and we just picked about and sold what few piles we could and it just set there until Monday. In other words, we couldn't sell it Thursday and we let it set there until Friday and we couldn't sell it all and we finished it up on Monday, what we had on the floor.

Q. All right. Mr. Sutton, you mentioned that you had 622 baskets to sell this year?

A. Per day, this year.

Q. How many last year?

A. 390 last year.

Q. You have increased your operations since last year?

A. Yes, sir.

Q. But you sold only about one-fifth as much tobacco?

A. As we did last year, yes sir.

[fol. 129] Q. I see. About one-fifth as much?

A. Yes, sir, something like that.

Q. All right, are your losses so far in this case the difference in commissions here?

A. Yes, sir.

Q. Are the differences related to what your unsold baskets would have brought?

A. Yes, sir.

Q. What is your estimate, or your closest calculation as to the commission you lost the first and second day?

A. The first and second day, probably from three to four thousand dollars.

Q. Somewhere between that?

A. Somewhere between three and four thousand dollars in commissions if I could have went on and sold my 622 piles of tobacco like I ought to.

Q. Now, your over-head expenses continued?

A. The same thing as if I had sold it. I had all the crew there to pay.

Q. Is your crew a right expensive crew to keep hired?

A. A right smart, yes sir.

Q. Would you say how many dollars your daily payroll is?

A. I don't hardly know how many dollars it is a day. [fol. 130] I don't know, but it will run about 25 or $30,000.00 a year expenses.

Q. For this type of operation?

A. Yes, sir.

Q. About 25 or $30,000.00?

A. Yes, sir.

Q. All right, sir?

A. Yes, about 25 to $30,000.00 a year, and my commission on those 600 piles of tobacco—I think the commission yesterday run between 17 and $1800.00, commissions and charges on yesterday.

Q. Well, if you have 271 selling days and your expenses for the year are—

Mr. Knox: If the Court pleases—

Judge Jones: (Interrupting) I think you ought to let your client testify.

Mr. Neville: All right, sir.

Q. Mr. Sutton, do you use your warehouse during the year for other things other than tobacco?

A. No, sir. I didn't this past year, I only let a man store some machinery in it.

Q. Did it bring in any rent much?

A. He gave me $100.00.

Q. Do you have much opportunity to use it?

[fol. 131] A. No, sir.

Q. Other than for that?

A. No, sir.

Q. Mr. Sutton, what percent of the tobacco that you sell comes from the Carolinas?

A. I would say from 85 to 95 percent.

Q. Would you be able to operate if your Carolina trade was taken off the market?

A. No, sir, I would not.

Q. Mr. Sutton, after the blue tags came off the tobacco in Georgia were you then able to begin operations again as you had planned?

A. Yes, sir, pretty good.

Q. That moved out the tobacco that started with the blue tags?

A. Yes, sir.

Mr. Neville: The witness is with you.

Cross examination.

By Mr. Knox:

Q. Mr. Sutton, on the opening day, you didn't have any Type 14 tobacco on your floor at all, did you?

A. Sir?

[fol. 132] Q. On opening day you didn't have any Type 14 tobacco on your floor at all, did you?

A. No, sir. That is Georgia tobacco?

Q. Yes, sir. Georgia, South Carolina and North Carolina?

A. I don't remember. I wouldn't say we did or didn't. I just don't remember whether there was or not. If we did, we didn't sell it. I don't know whether there was any on the tail end of the sale or not.

Q. All the tobacco that you sold on the two opening days was tobacco that came from North Carolina or South Carolina?

A. North Carolina and South Carolina.

Q. North Carolina and South Carolina. No type 14?

A. I think we had a little left from Virginia. I don't remember.

Q. Now, Mr. Sutton, last year, during the time you were selling this tobacco, and this type of card that you were using, there was no way to identify the type of tobacco that was coming from the Carolinas from Type 14 tobacco, was there, sir?

A. Yes, sir.

Q. How was it?

A. All the tobacco was identified from the cards that the farmers sells it on.

[fol. 133] Q. How do they identify it, sir?

A. Sir?

Q. How is it identified?

A. We put "GA" on all the bills, that is, on the tobacco from Georgia, and "S.C." for South Carolina, and "N.C." for North Carolina, and "VA" for Virginia, on the bills, not on the cards.

Q. Not on the cards?

A. No, sir.

Q. It is identified in the office?

A. Yes, sir.

Q. There was no way a buyer had last year of identifying Type 14 tobacco from any other type tobacco? That is right, isn't it?

A. Not by a blue card. Most of them know it anyway.

Q. Now, the only purpose of the blue card is to identify Type 14 tobacco from the other types?

A. I can't answer that.

Judge Simpson: You are representing the State of Georgia, not him.

Q. Mr. Sutton, this blue card does not in any way prohibit any other farmers from anywhere from bringing it in and sell it, does it?

A. Yes, sir, when you put a blue card on it, they do [fol. 134] not want to bring it in.

Q. There is nothing on the card that prohibits it?

A. Sir?

Q. There is nothing on the card that prohibits it?

A. Not that I know of.

Q. There is nothing in the Georgia Law that prohibits it?

A. I can't answer that question.

Judge Scarlett: Mr. Sutton, why did they not want to buy the tobacco when they saw the blue tag on it?

The Witness: Sir? I didn't understand you, Judge.

Judge Scarlett: Why did they not want to buy the tobacco when they saw the blue tag on it?

The Witness: I couldn't answer that, Judge. They just wouldn't buy it.

Judge Jones: Call your next witness.

Mr. Neville: Mr. Ed Wiggins.

The Marshal: Come to the stand, Mr. Wiggins.

Judge Jones: The testimony of the witnesses now being put on is beginning to fall into a pattern and the testimony they are giving is confirmed, as in no small measure, that which your first witness, Mr. Donaldson, gave. Isn't most of this testimony now becoming accumulative?

Mr. Neville: Yes, sir, it is, Your Honor.

[fol. 135] Judge Jones: Well, we don't want you to refrain from making out such record as is necessary, or as you think is necessary. I was just wondering if you could shorten the time in disposing of this matter by either eliminating some of the witnesses or by shortening their testimony, or perhaps the defendants might be willing to say that they would concede that the testimony of the other witnesses would be substantially the same as that which has been given.

Mr. Knox: I think we would be willing to do that, Your Honor, but of course we have stipulated as to the price differential already shown on there and that 50 percent of the tobacco sold on the Swainsboro and Statesboro Market were types other than Type 14.

Judge Jones: We don't want you to feel that we are trying to conduct your case for you nor trying to pressure you to keep out of the record anything that you think ought to go in there.

Mr. Neville: We understand that, Your Honor. We have no desire to put in accumulated evidence. Our purpose now would be to go strictly into the question of damages, since Mr. Wiggins represents another house and is one of the plaintiffs there, and I don't think there has been any stipulation that we have suffered damages.

Mr. Knox: I would like to call the Court's attention [fol. 136] to the fact that they have not prayed for any damages.

Judge Simpson: They have got to show damages to sustain an interlocutory injunction. They have got to show that.

Mr. Knox: We have agreed that the testimony that has been will be substantially along that line. We will concede that part of it.

Judge Jones: Are you will to concede that with the blue ticket on the tobacco these plaintiffs are selling less tobacco and receiving less in the way of commissions than they would sell and would receive if the blue tag wasn't on it?

Mr. Knox: We will be willing to concede that if he was put on the stand he will testify to that, sir, substantially as the other witnesses have.

Judge Jones: If you think it is desirable, why, go ahead and interrogate the witness.

Mr. Neville: May I have a moment to confer?

Judge Jones: Yes, indeed.

[fol. 137] Ed Wiggins, sworn for the plaintiffs, testified.

Direct examination.

By Mr. Neville:

Q. You are Mr. Ed Wiggins?

A. Yes, sir.

Q. You are on the Statesboro Tobacco Market?

A. Yes, sir.

Q. Earlier in this trial Mr. Robert Donaldson was on the stand—you know him, do you not?

A. Yes, sir.

Q. Is he familiar with your operations at Statesboro?

A. I think so, yes sir.

Q. Did you hear his testimony and understand what he said?

A. Yes, sir, I did.

Q. With particular reference to the New Statesboro Warehouse?

A. Yes, sir.

Q. Is that the warehouse in which you have a financial interest?

A. Yes, sir.

Q. Do you verify what Mr. Donaldson has said with regard to the sales conducted there the first two days of this season?

A. Yes, I do.

[fol. 138] Q. Mr. Wiggins, I will ask you this: Do you have a crew hired to serve this warehouse, sir?

A. Yes, sir.

Q. What would be your testimony with regard to commissions or commission losses during the first two days of this season?

A. I don't have those figures, sir.

Q. Do you state that there was a loss?

A. Yes, sir. I would say at least $5,000.00.

Q. At least $5,000.00?

A. No, I would say $1,500.00 anyway.

Q. Well, do you know?

A. Let's see, now. Well, $2,000.00 anyway.

Q. That is based on your number of baskets?

A. Yes.

Q. Since the blue tags have been removed has your house been having full sales or almost so?

A. Yes, sir.

Q. And has your income risen with these sales?

A. Yes, sir.

Q. Back to a normal condition?

A. Yes, sir.

Q. Or almost normal?

A. Well, I think they are normal now, yes sir.

[fol. 139] Q. Under the conditions the first two days, could you have continued the warehouse operations successfully?

A. No, sir.

Q. Would it have been a financial loss?

A. Yes, sir.

Mr. Neville: The witness is with you.

Cross examination.

By Mr. Knox:

Q. Mr. Wiggins, do you know how many acres of tobacco you have in Bullock County, sir?

A. About 5,000, I believe.

Q. 5,000?

A. More or less—about 4500, I would say.

Q. Why would it be impossible for you to operate your warehouse and sell tobacco grown in Georgia and not have a profitable operation?

A. Well, there are ten houses, I believe that's right.

Q. When was your house built, or constructed?

A. In 1946, one of them was. I don't know about the other one.

Q. At the time you built that warehouse you were aware [fol. 140] of the tobacco allotment that existed among the number of houses there in Statesboro at that time, is that not true, sir?

A. Well, I didn't build the house.

Q. You leased it?

A. No, sir. I bought in with Mr. Wooten.

Q. You bought in with Mr. Wooten? You were aware though of the number of acres you would have to draw from and the surrounding area and the amount of tobacco you had?

A. Yes, sir.

Q. And the amount of competition you had for that tobacco?

A. Yes, sir.

Q. Now, Mr. Wiggins, do you know of any reason why the producers of typed tobacco, other than Type 14, would have any objections to having the identity of their type of tobacco known?

A. I don't know about that.

Q. You don't know?

A. No, sir.

Q. Come down.

Judge Jones: You may go down.

[fol. 141] H. L. BRANNEN, sworn for the plaintiffs, testified.

Direct examination.

By Mr. Neville:

Q. Mr. Brannen, what kinship have you to the plaintiff, Mr. Aulbert Brannen, Sr., and the plaintiff, Aulbert Brannen, Jr., and Robert Brannen?

A. I am a brother to Aulbert Brannen, Sr., and Aulbert, Jr., and Bob's uncle.

Q. Do you live in Statesboro, Georgia, sir?

A. Yes, sir.

Q. What is your age, Mr. Brannen?

A. 45.

Q. Mr. Brannen, how are you engaged, if at all, in the tobacco business?

A. I am Assistant Manager of Brannen's Tobacco Warehouses 1, 2 and 3.

Q. For how many years have you been engaged in the tobacco marketing?

A. This is the 26th year.

Q. What has been your experience in the tobacco market business, the different jobs that you have done, and the different enterprises you have had?

A. Well, Joe, I have done anything from common labor to running a sale, buying tobacco, auctioneer, and just about some of all of it.

[fol. 142] Q. Have you been an independent buyer?

A. Yes.

Q. Called a speculator sometimes?

A. Yes, sir. That is true.

Q. Mr. Brannen, as Assistant Manager for Brannen's warehouses in Statesboro, are you personally familiar with what goes on there at those warehouses?

A. Yes, sir.

Q. You have been in court, have you not, and heard the other testimony on the stand?

A. Yes, I have.

Q. With regard to the volume of business there at that

house, or in the Brannen Warehouses this year—is this one of the books on the business there?

A. Yes, it is.

Q. Mr. Brannen, are you familiar with the chart that was earlier presented here to the court?

A. Yes.

Q. Was that chart made by your knowledge and with your concurrence?

A. Yes, it was.

Q. You are not the artist who drew it, are you?

A. Oh, no.

Q. Do you understand the chart?

A. Yes, I do.

[fol. 143] Q. Now, does the chart adequately and—

Mr. Knox: (Interrupting) Now, if the Court please, unless he prepared the chart, we object to it.

Mr. Neville: He testified that it was by his knowledge and concurrence, sir.

The Court: Your Honors, I told them what to put on there, but I can't draw.

Judge Simpson: The figures reflect your books?

The Witness: That's right, sir.

Judge Simpson: For last year and this year?

The Witness: Yes, sir, that is true.

Judge Jones: All right.

Q. Mr. Brannen, you may explain it?

A. Let me get my glasses, please.

Q. All right, sir.

A. May I stand up here, Judge?

Judge Simpson: Yes.

The Witness: I think it is—

Judge Simpson: (Interrupting) I think we had a pretty full explanation of it in counsel's opening statement. Did you hear what your lawyer had to say in the beginning?

The Witness: Yes, sir.

Judge Simpson: Would you adopt what he said about it?

The Witness: Yes, I would.

[fol. 144] Mr. Neville: Then we will be glad to take it down, sir.

Judge Simpson: Do you want to offer it in evidence?
Mr. Neville: Sir?

OFFER IN EVIDENCE

Judge Simpson: Do you want to offer it in evidence?
Mr. Neville: Yes, sir, we would like to offer this into evidence.
Judge Jones: Any objections?
Mr. Knox: We have no objections, Your Honor.
Judge Jones: Then let it be received and filed in evidence.

Note: Whereupon said chart was then marked for identification as Plaintiff's Exhibit No. 14, and received in evidence.

Judge Simpson: That is for the three houses?
Mr. Neville: Yes, sir.

Q. Mr. Brannen, you have seen this tobacco before, haven't you?
A. No, not that particular tobacco, Joe. I haven't seen it close enough.
Q. Mr. Bill Hussey brings this in. There are five parcels of tobacco and by looking on there you can see that each parcel is identified as "B-4F". Is that one of your standard government grades, sir?
A. Yes, sir.
Q. Each one of those has a tag on it—five in all, one [fol. 145] through five?
A. Yes, sir.
Q. Would you be able to say that you had seen tobacco of that grade before, "B-4-F"?
A. Yes.
Q. Of that kind?
A. Oh, yes.
Q. Since it has been stated by Mr. Hussey that the tobacco is from both Georgia and Carolina, would you undertake to say which one is from what state, sir?
A. No, I wouldn't.
Q. Why would you not do that, sir?
A. Well, if I might say so, there is not any difference in the tobacco, that is, as far as the characteristics of the

tobacco is concerned. It has the same aroma. It has the same qualities and most likely it is the same seed. I think most people would take for grant that was Hitch Broad Leaf, and it wouldn't matter much where it came from.

Q. Now, when you mentioned the same seed, and you say that is Hitch Broad Leaf?

A. I just said I take for grant it was. That is one of the possible varieties. It certainly has those characteristics.

Q. Well, what about the tobacco moving through your [fol. 146] warehouses, do you have several varieties?

A. Oh, yes, we have several varieties.

Q. You have several varieties of tobacco moving through your warehouses at Statesboro?

A. Yes, sir, several varieties grown in our own county.

Q. Mr. Brannen, state to the court, if you will, the similarities of tobacco and the similarities that they go through in being planted and grown from seed?

A. Well, as I said down here the other day, we buy a lot of tobacco seed that is resold to growers to plant. This is a non-profit item. We are the go between to get the plants grown where they can be set out. We buy these seed that are grown in North Carolina, and they are grown in the lower edge of Georgia here and in Florida, and then we are still a go between our customers in Georgia and South Carolina and North Carolina to get these plants and carry them back and get them planted. Now, that is a good reason that there is not a lot of difference in the tobaccos. We work with our customers the year around such as securing seed for plant growers, and then the go between the farmers and the plant growers to see that they get the plants.

Judge Simpson: Do most of the farmers up there there have their own seed beds or do they go down in Florida and buy them wherever they raise them?

[fol. 147] The Witness: We have very few local growers in my community because the climate is a little colder there. We have some that specialize in a little growing, but most of them come out of South Georgia and Florida that go to Bullock County.

Q. Do some of those plants go into the Carolinas, some of those same plants?

A. Very many of them, yes sir.

Q. And they are transplanted up there and grown for a while?

A. Yes, sir.

Q. And ultimately a lot of them are brought back to Georgia?

A. Yes, sir, the same plants. I can sell the seed that grow the plants and sell the tobacco. That is about the story about it.

Q. Mr. Brannen, as a tobacco buyer and being experienced in the business, would you state to the court what difference, if any, in Type 14 tobacco and other flue-cured tobacco?

A. Well, I never heard of Type 14, 13 and 12 being used except only as a figure to say this is the locality that the tobacco was bought in, not until the blue card was originated. Type 14 doesn't mean anything to us and never has, I mean in past history. The tobacco is all useable, in [fol. 148] fact, it all would have to be useable, because we only raise about ten percent of the tobacco that is raised or grown in the Bright Belt here in Georgia. We would be in bad shape if that was all we had to depend on. The tobacco is on the floor there and it is very similar, as you would see, these that has come from all states that sell tobacco in Georgia. I am sure there are certain types of tobacco, in fact, there are some Georgia tobaccos that is very distinct in certain ways. I mean by that they have a certain characteristic that most of us would game that it came from Georgia. There are a few from the Carolinas, some of these that I heard mentioned awhile ago. I call it a type of tobacco where they have diseased land and things like that where they can't grow anything else, or maybe they grow it because it makes more pounds. I don't know which they do it for. Some grow much more pounds on that than they do on these old varieties.

Q. Has the putting of a blue tag on any of the tobacco on the Statesboro Market, or on the Brannen Warehouses, served any good purpose that you have discovered?

A. Well—

Mr. Knox: (Interrupting) Your Honors, we object to that unless he states the basis on which he bases his opinion on.

Q. I will ask it another way. Has it helped Georgia farmers to obtain a better price—

Mr. Knox: (Interrupting) That is the same thing. That [fol. 149] is a mere conclusion.

The Witness: I would like to explain this blue card this way, Judge, Your Honors.

Judge Simpson: You had better answer the question first that he asked and then explain.

The Witness: I am sorry, I thought I did.

Q. I asked whether it helped the Georgia growers, meaning those trading at the Brannen Warehouse, to obtain a better price, if not, what effect it did have?

A. No. It didn't help, and why it didn't help is like I explained before. We had, on our opening day there, practically all white cards, and at one of the other houses we had some blue cards. On Friday there was not enough of Georgia tobacco to fill the floor. We had it pretty well mixed, and the price of the Georgia tobacco, I think, was held down, in fact, I know it was held down by the blue tag. You heard these other people testify that they didn't bid on it. You heard them talking about support price.

Mr. Knox: Now, Your Honor, he is getting far away from the question that was asked him.

Judge Jones: Yes, I think you are going a little beyond answering the question.

Q. Now, Mr. Brannen with particular reference, not the Brannen Warehouses—well, I will put it this way: [fol. 150] With particular reference, now not to the Statesboro Market, but to Brannen Warehouse sales, has there ever been an opening day when you did not have a full sale until this year? Did you have a full sale this year on the first day?

A. Yes, we had it on the first day. No, no, I am sorry, I don't think we quite did, Joe, but ordinarily we would be full on the opening day, yes sir.

Q. Ordinarily would the entire market be full on the opening sale?

A. Yes, sir.

Q. On the first day?

A. Yes, sir.

Q. Mr. Brannen, regarding the damages of the Brannen Firm, would those damages or loss of commissions be based on the volume of dollars there?

A. Yes, very much. We had the tobacco there, but the chart will show that we didn't sell full sale, and the blue tag is why we didn't sell a full sale.

Q. About how much percent of your all trade is the Carolina trade, approximately?

A. Well, that is a hard question. We use all the Georgia business that we can get, and then we finish with that, but I imagine it will run 33⅓ percent to 40 percent, but that is a guess, however.

[fol. 151] Q. Would you be able to continue your operations if you loss all of your Carolina trade?

A. No. We couldn't carry on.

Q. Could you tell us about how many people work for the Brannen Warehouses?

A. Well, it is approximately 100 people in all.

Q. Do you have a very substantial payroll for these people?

A. Yes, sir.

Q. Do your overhead go on and on day in and day out regardless of sales?

A. Yes, it does.

Mr. Neville: The witness is with you.

Cross examination.

By Mr. Knox:

Q. Mr. Brannen, the Georgia Tobacco season last about how long?

A. About five or six weeks in Statesboro.

Q. Now, you say you have three warehouses over there?

A. Yes, sir.

Q. You have three warehouses in Statesboro?

A. Yes.

[fol. 152] Q. Is it your testimony that if you lost your North Carolina and your out-of-state tobacco that you would have to close your warehouse completely? All three of them?

A. I will put it this way: A lot of them would have to close. If everybody else closed theirs I think we could operate ours, but I don't think they will be that generous.

Q. You would have to close all three of your warehouses, is that your testimony?

A. If everybody else continued to operate.

Q. Of course, you realize, from the previous testimony in this case, that there are approximately 5,000 acres of tobacco in Bullock County?

A. Yes, sir, but I don't think there is quite that much though.

Q. You don't think there is quite that much?

A. No, sir.

Q. But Bullock County does have a larger allotment than many other counties in Georgia? Is that not true, sir?

A. Yes, I believe so.

Q. Now, Mr. Brannen, is it your testimony that plants taken from the same plant bed in Georgia or Florida and planted in the different areas, where various types are grown, such as in Georgia, Florida and in North Carolina, where the climate and the soil is different, that all three of [fol. 153] those would have the same chemical content and characteristics when harvested and marketed?

A. No, sir. I didn't say that.

Q. You didn't say that?

A. No. I am not a chemist, but I will put it this way: They sell all right with a white tag.

Q. They sell all right when they are not identified or certified as being Type 14 tobacco, that is true, isn't it?

A. Yes, also those same grades are averaging more in South Carolina right now than they are in Georgia. They are selling all right. They are good stuff.

Q. Why, if any, would any producer, have any objection to selling his tobacco, properly identified, if that is true as to type?

A. You mind re-asking that question?

Q. I say, basing it upon your answer, why would any producer have any objection to selling his type of tobacco properly identified in Georgia?

A. Because they were doing so well before they started this identifying, and they have been doing a lot worse since.

Q. Then you admit that the only reason he doesn't want to is because he thinks when it is identified he is not going to do as well?

A. That's a good reason, yes sir.

[fol. 154] Q. That is the reason you think so?

A. Now, who are you talking about?

Q. I am talking about the man who produces the tobacco?

A. Yes. I think any man who was doing worse under a new program would like to go back to the old one.

Q. You don't see any reason then why he should object other than he is not doing as well?

A. Well, we are know that we were having a very satisfactory market, left alone, with a white tag, and we know that it was interrupted a lot when the blue tag was put on.

Q. Mr. Brennan, what it really boils down to is that the South Carolina farmers and North Carolina farmers produce other types of tobacco than this and they just simply object to having his type of tobacco identified and sold along side of and compete with Type 14. Now, that is what it really boils down to, isn't it?

A. I don't think that is it at all, sir. I think he just doesn't want to get half price for his tobacco. I don't think there would be any objections if they put a red tag on there just so they got the money.

Q. But if the tobacco will not bring the money when it is properly identified and sold alone, then you want to keep the identity in the dark and try to sell it in the re-

[fol. 155] flected glory of Type 14?

A. I don't think it is properly identified when it would cause a man maybe to lose his farm or his year's work or something like that, especially when he is giving you a good product.

Q. Mr. Brannen, you have just testified that there is no way from a physical examination to tell where the tobacco comes from, isn't that true?

A. Then why mess with it? Just leave it alone.

Q. Aren't you willing to concede that when tobacco is identified it will not bring the price when it is otherwise, then there is a deficiency in the moisture content or something in there that is making that happen?

Judge Jones: Is that a proper question?

The Witness: I would like to answer it, Judge.

Mr. Knox: I will withdraw it, Your Honor.

Judge Jones: All right, you may go down.

The Marshal: Come down.

Mr. Neville: Your Honor, we would like to introduce this tobacco in evidence, and would like to have it identified as Plaintiff's Exhibit.

The Clerk: It will be No. 15.

Note: Whereupon, said samples of tobacco above referred to was marked for Identification as Plaintiffs' Ex-
[fol. 156] hibit No. 15.

Offer in Evidence and Objection Thereto

Mr. Neville: May it please the Court: We would like to introduce in evidence the transcript of the proceedings held here last week, I believe that was the 10th of August, and if the defendants do not object we would like to introduce this transcript as a part of the evidence in this case.

Mr. Knox: We will object, because it is a transcript of a different proceeding, at a different time and for an entirely different purpose, that is, on the question as to whether the Judge would dissolve the restraining order then. The only place where it would be relevant would be in the event a witness or witnesses, who testified at that time, is not here today or could not be here, or unless, of course, it was introduced for impeachment purposes, and he can't impeach his own evidence and we haven't offered any evidence yet.

Mr. Neville: There is evidence here, in part at least, of the witnesses who have not testified today, due to the time

aspect which we have not called, and they will state today substantially the same testimony as was given last week.

Mr. Knox: He hasn't shown, Your Honor, that the witnesses were subpoenaed, or that there was any reason why they couldn't be here.

Judge Simpson: Wasn't it stipulated here this morning that we would use this record that was made the other day? [fol. 157] What do you think is the difference in the issues on a motion to dissolve a temporary restraining order and then move for an interlocutory injunction?

Mr. Knox: Your Honor, it was very informal, and it would not have been appealable as far as this record that is trying to be made here today would be. We think this hearing today is an entirely different type of proceeding than the other one was. We certainly have no objection, if he has the witnesses here, to offer them.

Judge Simpson: I certainly think we ought to consider it and then let each side supplement it, if they want to. That is my view. It is made on this issue in this case. I think we ought to consider everything in this record.

Judge Jones: We are not going to be here too much longer this afternoon. The Court will consider and later rule upon your tender of the transcript on the proceeding on the motion to dissolve. Do you have one short witness that you want to put in before we knock off for the day? Have you finished?

Mr. Neville: We have, sir. What we might put in now would be probably accumulative, and we do not care to put up any further witnesses particularly in the light that the Court may consider this transcript of the other hearing. For instance, Mr. Spearman, who testified, appears in here.

Judge Jones: Is he available? Can he be made avail- [fol. 158] able here to testify, if necessary?

Mr. Neville: Yes, sir.

Judge Jones: Then I think you had better get him here in the event we decide not to consider this transcript.

Mr. Groover: Now, Your Honor, since you are reserving this and it will take until tomorrow to complete this hearing, this motion to dissolve was more or less informal, in that there were very few, if any, objections made concerning hearsay, I wonder what the Court's position would

be if it were admitted without objection, subject to objecting to that testimony only which would be hearsay? There are some speeches that may not be competent evidence. It was not objected to because of the type of hearing.

Judge Jones: Well, we haven't got any jury here. If you going to say we can consider it, it seems to me that you must have sufficient confidence in the court for us to know what is and what is not evidence and what is to weigh with us.

Mr. Groover: That's correct, sir.

Judge Jones: We ought to be able to identify what is evidence and what is not evidence and what is admissible and what is not admissible.

Mr. Groover: The question that we would like to be able to consider, if your Honor please, if we determine that it be admitted without objections on our part, and in the event it got into the Appellate Court, and in the event [fol. 159] there was something in there that was not admissible we would not be taking the position that it was admitted without objection.

Judge Jones: Well, we can hear the witnesses in less time that we can go through all of this with you and determine what you might think was hearsay and what you might regard as not being hearsay. Now, in the event that transcript is excluded, how much more time do the plaintiffs want? Can you make a guess as how long you think it will take for you to conclude?

Mr. Neville: Just a moment, Your Honor. We have in court, Mr. J. M. Spearman. He is an employee of the plaintiff, Mr. William Hussey, and was floor manager of that warehouse at Swainsboro. I understand he has a bad knee and is planning to go back to Swainsboro this afternoon.

Judge Jones: How much time will it take to hear him?

Mr. Neville: A very short time, Your Honor. I might state that his testimony would be—

Mr. Knox: (Interrupting) We stipulate that Mr. Spearman's testimony taken from that record can be introduced in this hearing today.

Judge Jones: Are you content?

Mr. Neville: Yes, sir.

Judge Jones: Anything further for the plaintiffs?

PLAINTIFFS REST

Mr. Neville: With that, Your Honor, we rest.

Judge Jones: Can counsel for the defendant hazard a [fol. 160] guess as to how much time will be required to put on their case?

Mr. Knox: If the Court pleases, of course, it always depends upon the cross examination, but subject to cross examination, we will say approximately two hours.

Judge Jones: Are counsel from out of town, out of Brunswick, planning to remain over tonight. Any counsel or anybody here planning to go back to Swainsboro or anywhere else and return in the morning?

Mr. Neville: We are prepared to stay here as long as necessary, Sir.

Judge Jones: Will it inconvenience anybody to meet at nine o'clock in the morning? There being no objection, we will convene at 9:00 o'clock in the morning.

Note: At this point the proceedings were recessed from 5:00 o'clock, P. M., Tuesday, August 16th, until 10:00 o'clock A. M. Wednesday, August 17th, at which time the proceedings were resumed as follows on the next page.

[fol. 161] (Note: The following is a copy of the transcript of the testimony of J. M. Spearman, a witness for the plaintiffs on the former hearing in this case, which was admitted into evidence on behalf of the plaintiffs in the present case in lieu of the said witness testifying in person.)

J. M. SPEARMAN, sworn for the plaintiffs, testified.

Direct examination.

By Mr. Durden:

Q. Mr. Spearman, you were sworn with the other witnesses this morning?

A. That's right.

Q. Where do you live, Mr. Spearman?

A. In Emanuel County, Adrian, Georgia.

Q. Were you born there?

A. Yes, sir.

Q. Do you grow tobacco?

A. Yes, sir.

Q. How long have you been working in tobacco?

A. Well, most all of my life, since I was a child, and since the Service.

Q. When did you come out of the Service?

A. In 1948.

Q. Since you came out of the service in 1948, you started [fol. 162] growing it yourself?

A. Yes, sir.

Q. Are you a member of the Farm Bureau?

A. Yes, sir.

Q. Do you hold an office in the Farm Bureau?

A. I am President of the Community Chapter.

Q. Out at Norristown?

A. Norristown, Georgia.

Q. Are you a Committeeman on the ASC Committee?

A. I am Chairman of the County Committee.

Q. What is the ASC Committee?

A. Agricultural Stabilization Corporation.

Q. Weren't you elected Master Farmer of Georgia at one time?

A. I was third place winner of young farmers this year.

Q. Just what is that?

A. Well, I couldn't hardly tell you that.

Q. It is an honor paid to outstanding farmers, is that correct? It is very embarrassing to have to brag on yourself and your qualifications? Mr. Spearman, I believe you are also employed by Mr. Hussey?

A. Yes, sir. That's right.

Q. What position do you hold with him?

[fol. 163] A. Floor Manager.

Q. Now, then, Mr. Spearman, do you know what a discount tobacco is?

A. Yes, sir.

Q. What is discount tobacco?

A. It is a variety that the U. S. Department of Agriculture supports at half price, Coker 139, Coker 140 and Dixie Bright 244.

Q. Have you ever had any experience in identifying this discount tobacco?

A. Yes, sir.

Q. Just what is that?

A. For the last your years I have been employed by John F. Bradley, State Administrator, as tobacco specialist.

Q. What were your duties as a tobacco specialist.

A. To visit fields in different counties wherever he sent me.

Q. What counties are included in your territory?

A. I had seventeen counties this year.

Q. You had seventeen counties this year?

A. Yes, sir, all in southeast Georgia.

Q. In fulfilling your duties, did you have occasion to inspect tobacco growing in the fields in these seventeen counties?

[fol. 164] A. Yes, sir.

Q. How did the quality of tobacco, say, on a line north of the Altamaha River compare in quality with tobacco south of the Altamaha River?

A. Well, this particular year, north of the river, was awfully dry.

Q. Awfully dry?

A. Yes, sir.

Q. And the adverse weather conditions affected the tobacco?

A. Tobacco growing there at the time I was there in June and the first two weeks in July below the river was much better than above the river.

Q. Is it true or not true that tobacco in south Georgia tends to mature earlier in the selling season than tobacco north of the Altamaha River?

A. I would say yes.

Q. What length of time differential would you say there is?

A. Most times, about two weeks.

Q. About two weeks. Mr. Spearman, when tobacco is moved from the curring barn, you leave it on the sticks, is that correct?

A. That's right.

[fol. 165] Q. Does anything happen to that tobacco while it is piled on these sticks in the pack house?

A. Well, my experience is that the longer you let it stay on the sticks, to a certain extent, will make it a better grade of tobacco when you take it off.

Q. Will the green tend to fade out?

A. In some cases, yes sir.

Q. In some cases. Would the two weeks extra time that the south Georgia farmers have to pack that tobacco tend to improve the grade of that tobacco?

A. Some.

Q. Did you see the tobacco market in Baxley this morning?

A. Yes.

Q. How did it compare on grade for grade with the market that you are familiar with in Swainsboro.

A. Well, the tobacco there, I would say, was a little further up the stalk on the floor, more leafy tobacco, what we are just now getting in Swainsboro.

Q. You say that it is a little further up the stalk. The first tobacco that you crop, it ripens from the bottom of the stalk up, am I correct, sir?

A. Yes, sir.

Q. How do you classify the first tobacco that you crop [fol. 166] next to the ground?

A. Lugs.

Q. Now, is that what you are selling in Swainsboro at this time?

A. Well, we are beginning to get off the lugs. We are beginning to get up the stalks.

Q. All right. Now, what is the next classification of tobacco?

A. I wouldn't know.

Q. Is it the leaf?

A. No, I wouldn't think they call it the leaf, but I am not sure what they call it.

Q. The last classification, that is right at the top of the stalk?

A. That's the tips.

Q. Now, in Baxley, they are selling the leaf, the center part of the stalk. That is what you observed this morning?

A. That's right.

Q. While we are still selling the lugs around Swainsboro and Statesboro?

A. That's right.

Q. And that two weeks difference there affects the grade and quality of the tobacco, or the color?

A. Yes, in some cases.

[fol. 167] Q. Therefore, the tobacco in South Georgia, where they are selling their prime leaf now, should bring a higher price than the lugs that we are selling up around Swainsboro and Statesboro?

A. Well, I would think so.

Q. Mr. Spearman, you have heard them talk about the support price—do you know the meaning of support price on tobacco?

A. Well, it is a price that the Government guarantees a farmer.

Q. Is that on the basis of a 100 percent of the value of the crop, or 90 percent of parity?

A. We are supported at 90 percent of parity.

Q. Which is not a full 100 percent of the value of the crop?

A. Well, I don't know about that.

Q. Being on the tobacco market constantly up there in Swainsboro, you have occasion to talk to farmers from Georgia and South Carolina?

A. Yes, sir.

Q. Do you talk to numerous farmers from Emanuel County?

A. Yes, sir.

Q. Is it true, or is it not true, that the feeling of the [fol. 168] farmers of Emanuel County that the blue tag law has hurt them?

A. They feel that it has hurt the market and it is going to cause them to have to carry their tobacco some 40 or 50 miles to the next market, many of them.

Q. They will have to carry their tobacco 40 or 50 miles to be sold because the warehouses in Emanuel County will be closed down?

A. Yes, sir, they can't operate.

Mr Durden: Your witness.

Cross examination.

By Mr. Harrison:

Q. Mr. Spearman, do you produce tobacco yourself?

A. Yes, sir.

Q. What are your duties as floor manager?

A. Well, to see that the tobacco is put on the floor in an orderly manner.

Q. Do you handle the weighing, sir?

A. I have a man under me that does the weighing. He is a certified weigher, and bonded.

Q. Mr. Spearman, is it very difficult to place the distinct tags on the tobacco as it is being weighed into the warehouse?

[fol. 169] A. No, sir, none whatever.

Q. It does not interfere with the free flow of the tobacco onto the floor?

A. No, sir.

Q. It is not difficult to determine from the information submitted which one should go on there, is there?

A. No, sir.

Q. Mr. Spearman, do you object to the quality of the tobacco that you offer for sale, and the type, being known?

A. My tobacco?

Q. Yes, sir.

A. No, sir.

Q. You have no objections then to the quality and type being known to everybody?

A. No, sir.

Q. Now, you stated that you had travelled around all over the state identifying tobacco as to undesirable varieties, is that right?

A. Yes, sir, in seventeen counties.

Q. Is it not true that the marketing of the undesirable varieties of tobacco, that a separate and distinct marketing card is placed on each basket that is not either one of these here?

A. It is a red card. We don't have any in Georgia this [fol. 170] year.

Q. In other words, whether or not it is an undesirable

variety has nothing to do with the market under the Georgia law?

A. No, sir.

Mr. Harrison: We have no further questions for this witness at this time.

The Court: All right, you may go down. Call your next witness.

[fol. 171] T. L. Sems, sworn for the Defendant, testified.

Direct examination.

By Mr. Harrison:

Q. Will you state your name, residence and profession?

A. T. L. Sems, Clemson, South Carolina. I am a professor at Clemson, and a WA employee in the United States Department of Agriculture, Tobacco Division.

Q. Briefly state the training and experience that you have received to qualify you for your profession?

A. Well, I did my under-graduate work at Clemson College, and I did some graduate work at Tennessee and Maryland, and I have a Master PHD from Marvland, and I have been working with tobacco for approximately fifteen years, and I worked with the Variety Discount Program since its inception, and I am responsible for setting up all the test spots in all the flue-cured states, taking samples, analyzing the samples in various areas.

Q. By whom are you now employed, Mr. Sems?

A. Both Clemson College and the Department of Agriculture.

Q. How long have you been so employed?

A. Well, I have been with Clemson for about twenty years, except for military service and leaves of absence for further study, and with the Tobacco Division for approximately three and a half years now.

[fol. 172] Q. Are you familiar with the various types that have been established by the U. S. Department of Agriculture for flue-cured tobacco?

A. Yes, sir.

Q. In connection with your employment, have you had an opportunity to conduct experiments to determine the chemical content in the various types of flue-cured tobacco?

A. Yes, sir.

Q. Will you give the court the results of your experiments and findings?

A. Well, would you like for me to state in detail the specific types of results or just in general what we have found?

A. Would you give the court the results of your inspection as to flavor and aroma and nicotine content and other chemical factors?

A. Well, as far as the flavor and aroma, of course, we have, in our particular work, no definite test to indicate those. We have been mostly concerned with total alkaloids and oxygen and the ratio of these in our identification work. And we have test plots that we use at the University of Florida and the Tifton Experiment Station and test plots in the various counties of Georgia and throughout the Carolinas and Virginia. In this particular work, we take [fol. 173] samples, both green and cured, and these are analyzed by varieties and by areas and we work them into the various types, and as a rule we have found that there is a variation in the actual chemical content from one section to another, that is, by types.

Q. Then your testimony is, Mr. Sems, that there is a difference in the chemical properties of Type 14 and other types of tobacco?

A. Yes, sir.

Judge Jones: What do you mean by Type 14?

Mr. Harrison: Your Honor, I believe we have stipulated that Type 14 is that flue-cured leaf tobacco that is commonly grown in the states of Georgia, Florida and Alabama, as defined by the U. S. Department of Agriculture and the Georgia Identification Act.

Judge Simpson: Either or—the definitions are not quite the same.

Mr. Harrison: But, Your Honor, we take the position that there is no substantial conflict.

Judge Jones: Is the witness taking that position?

Mr. Harrison: Your Honor, the question directed was to the witness was whether or not there was a difference in the chemical properties of Type 14 and other types of flue-cured tobacco.

Judge Jones: Will you ask him, or I will, what he under-[fol. 174] stands by Type 14?

The Witness: I would like to clarify that, because all of our samples, according to Type 14, would be Georgia and Florida. We have no samples from Alabama. For our Type 14, as far as chemical analysis, would be confined to the states of Georgia and Florida.

Judge Jones: Would you say that tobacco of comparable characteristics and quality could not be grown in South Carolina?

The Witness: I would have to, more or less, confine myself to specific localities.

Judge Jones: Well, could you say that tobacco of comparable characteristics and quality could not be grown in the state of South Carolina?

The Witness: No, sir, I couldn't say that, if you word it that way.

Q. Mr. Witness, what factors determine or affect the chemical content of tobacco?

A. Of course, variety, the area in which it is grown, and by that I mean climatic conditions, soil conditions and so forth.

Q. Will you state whether or not the chemical content of a pile of tobacco has a direct bearing on its desirability to both the foreign and domestic purchases on those markets?

[fol. 175] A. Yes, sir.

Q. Why is this true, Mr. Witness?

A. Well, of course, I have not had any experience in actually blending it, like the companies, but according to their blending and so forth they mix the different types according to the chemical constituent contained therein and come up with the type of tobacco that they want. They do their own blending, so you will vary from one locality to another and that is one of the reasons I would base my answer on.

Q. Mr. Senn, is it possible to determine the chemical content of a pile of tobacco by a visual inspection?

A. Not that I know of.

Mr. Harrison: Your witness.

Cross examination.

By Mr. Neville:

Q. Mr. Senn, assuming that tobacco grown in Georgia, in one area of Georgia, would have certain physical or chemical characteristics, and you go across the Savannah River and you find soil and climate and the other physical circumstances of farming the same and the variety blended: there is the same, would it not also have the same characteristics as the Georgia plant?

[fol. 176] A. It depends on how far you go across. There is no definite demarcation, as I see it, because soils and climates don't just change from one place to another place.

Q. There is no good reason then to suppose that a tobacco of a given variety grown north of the Savannah River would be categorically inferior to the same variety grown south of the river, is there, sir?

A. Well, the word "inferior" there, I—

Q. (Interrupting) Isn't that in the sense of demanding an inferior price in a fair and competitive market place?

A. There would be a difference, but whether it would be inferior or a difference in price differential or not would be another thing.

Q. I understood you awhile ago, in response to a question from the court, to say that you could not say that tobacco could not be grown north of the river essentially the same as south of the river—meaning categorically—

A. (Interrupting) Well, I would like to clarify that to this extent: If we just take the river as a line of demarcation, meaning just across the river, then, of course, it would not, but if you go further north, say, to Horry County and up right on the edge of the North Carolina Line, Dillon and so forth, then you begin to pick up differences.

[fol. 177] Q. Yes, sir. These findings of yours, have they

been made known to the United States Department of Agriculture?

A. Yes, sir, I have given them reports on that.

Q. The Federal Government is not without knowledge of these circumstances?

A. No, sir.

Mr. Neville: That's all.

Judge Simpson: Is there also a difference, Doctor, we will say, from Hitch Broad Leaf Plant, from the same bed, grown in North Florida or South Georgia, reaching up as far as Valdosta, or Hahira or Adel, and tobacco from Hitch Broad Leaf plant grown up in what they call the eastern part of Georgia, that is, that reach the Statesboro and Swainsboro markets in ordinary course of commerce?

A. I have never grown out of the same plant bed, but we have used the same varieties all the way up and we have found that they do vary, from our experiment station, on up through the entire flue-cured belt which we contribute to soil conditions and climatic conditions.

Judge Simpson: In other words, there is likely to be a greater difference in the chemical contents and other characteristics between tobacco on the Adel or Hahira or Valdosta markets as opposed to those on the Swainsboro or Statesboro markets as there is between Swainsboro and Statesboro and on up through the Carolinas?

[fol. 178] The Witness: The alkaloid content, for example, down in Florida—we usually think of tobacco there as lower, and by that I mean, we will say, specifically, approximately 1.5 compared to—

Judge Simpson: (Interrupting) The alkaloid, is that nicotine?

The Witness: Yes, sir. It is total alkaloids. And by the time you get to the Carolinas you are up to the 2 or 2½ and then when you get up into Virginia, of course, you have 3, or better, as far as alkaloid percentage is concerned.

Judge Simpson: Well, then, is it fair to say that Type 14, by itself—or by its definition is not itself entirely consistent in either chemical content or other characteristics. In other words, Type 14, the way you apply it, is a classification according to geographical origin?

The Witness: Right.

Judge Simpson: And it is not consistent in itself, as I understand it?

The Witness: But they don't have as many varieties grown in that area as they do in some of the others, so I would have to say 'within that area'.

Judge Simpson: Are there many varieties of plants?

The Witness: Yes, sir.

[fol. 179] Judge Simpson: Well, there is no reason that a Florida or South Georgia farmer couldn't grow an inferior or substandard variety, is there? Isn't that right?

The Witness: That's true.

Judge Simpson: I think, in order for the answer to mean anything, you have to assume the same variety of plants?

The Witness: Yes, sir.

By Mr. Harrison:

Q. From what you have testified, Dr. Senn, is it possible for a bed of tobacco, plants to be taken from a single bed of tobacco, the same variety, grown under the same conditions, and those plants be transplanted to different areas that produce the different types and due to the soil and climatic conditions that the resulting tobacco would have different chemical properties?

A. Yes, sir.

Mr. Harrison: We have no further questions.

Judge Jones: You may step down.

[fol. 180] Ben J. Narz, sworn for the defendant, testified.

Direct examination.

By Mr. Harrison:

Q. Will you state your name, please?

A. Ben J. Narz.

Q. Where do you live, Mr. Narz?

A. Lexington, Kentucky.

Q. By whom are you employed, sir?

A. Universal Leaf Tobacco Company.

Q. How long have you been so employed?

A. Forty years.

Q. In what capacity are you employed at this time?

A. District Supervisor for the Universal Leaf Tobacco Company in North Georgia, comprising the markets of Swainsboro, Statesboro, Claxton, Metter and Vidalia.

Q. What are your duties in this capacity, Mr. Narz?

A. To give out instructions to our buyers to buy the various grades of tobacco and also prices.

Q. Are you now operating on the markets that you have enumerated?

A. Yes, sir.

Q. How long have you been working on the Georgia tobacco markets, sir?

A. 29 years.

Q. Mr. Narz, approximately how long do the buyers [fol. 181] have to examine each individual pile of tobacco before it is sold in the normal sales held in Georgia.

A. I would say an average of between seven and eight piles per second.

Q. State whether or not it is possible for buyers to identify at the time of sale Type 14 Tobacco from other types of tobaccos by a visual inspection?

Judge Jones: Now, I would like for him to say what he means by Type 14 tobacco? Do you understand Type 14 tobacco to be that only grown in Georgia, Alabama and Florida?

The Witness: Yes, sir.

Judge Jones: All right.

The Witness: At the rapid rate tobacco is sold it is practically impossible for the buyer to select the Type 14 from other types. However, a few crops can be selected but there are a very few and I would be reluctant to say what percentage that could be identified.

Q. At normal rate of sale, for all practical purposes, it is almost impossible to determine the type?

A. Yes, sir.

Q. Is it desirable for you, as a buyer, to know the identity of the type of flue-cured tobacco at the time of sale?

A. Very desirable.

Q. Will you explain why it is desirable, sir?

[fol. 182] A. There are several reasons. First, we came down here to buy Type 14 for our customers, both domestic and export, or foreign, whatever phrase you might use, and these customers expect us to buy Type 14, because a formula has been worked out by both domestic and foreign companies that they want this Type 14 and other types separately, so they can work out the blends just for their formulas.

Q. Mr. Narz, by a visual inspection, can you determine the chemical properties of a pile of tobacco?

A. No, sir.

Q. Are these characteristics shown by any government grade?

A. No, sir.

Q. Prior to the 1960 Georgia Identification Act was there any means by which the true identity as to the type of tobacco offered for sale was made known to the buyer?

A. No, sir.

Q. State what effect the Georgia Identification Act has had upon the marketing of tobacco in so far as the buyers are concerned?

A. I would say that you would have a more orderly or a more stable market if the buyers were aware that they were buying Type 14 and the identification was made out there from the various other types that are shown on the market. They would have the confidence and know and [fol. 183] go ahead and purchase the tobacco that they are expected to buy.

Q. Mr. Narz, do you have an opinion as to what would be the result of the increase sale of types of tobacco, other than Type 14, upon the Georgia Market without identification as to type?

A. I would say that it would have a dire effect on the market because it detracts from the buyers—they are seeking Type 14, and the conglomeration of tobacco from other states puts the buyers, as well as the supervisor, in a quandary. I would say you would have a more orderly and a more stable market.

Q. Mr. Narz, does Type 14 tobacco demand any different price when it can be identified as such?

A. Well, the buying companies like the Type 14 tobacco because it is of the old variety and it has flavor and aroma which is used in the blends of different companies, both by domestic and foreign trade.

Q. Is it or is it not true that if the identity of Type 14 tobacco is lost the producers of such tobacco in Georgia will lose the full price he is now receiving?

A. Will you repeat that, sir?

Q. I say, is it, or is it not true, that if the identification of Type 14 tobacco is lost the producers of such tobacco in Georgia will lose the full price that he is now receiving? [fol. 184] A. Definitely so, because it is possible for buyers, in their anxiety to purchase Type 14, could possibly overlook Type 14 at the rapid rate that they are selling tobacco.

Mr. Harrison: Your witness.

Cross examination.

By Mr. Neville:

Q. Mr. Narz?

A. Yes, sir.

Q. Are you undertaking to say that these Georgia farmers have been under-paid by Universal for 29 years in Georgia?

A. No, sir. I did not say that.

Q. . re you undertaking to say that Georgia farmers have been under paid by any of the buyers in previous years in Georgia?

A. I did not say that.

Q. Are you saying then that you have paid a fair price through the years to Georgia farmers?

A. Yes, sir.

Q. For their leaf tobacco?

A. Yes, sir.

Q. Are you saying that, in your opinion, other buyers [fol. 185] have paid a fair price in previous years to Georgia farmers?

A. Yes.

Q. Can you explain to the court and to me why the Carolina tobaccos sold so poorly on the Swainsboro and Statesboro markets the first two days of this selling season, and why Carolina tobacco sold in Carolina, when the market opened last Thursday, sold rather well? Can you explain that?

A. Yes, sir, I can.

Q. All right, sir?

A. The first few days, from my own experience, I saw some, what we term, the commonest type of tobacco that could possibly be marketed, not piles, but rows. Now, of course, all of this did not come from up the country. There was some poor style type of tobacco from Georgia.

Q. You saw this where, sir?

A. On all markets in North Georgia, and later on a netter type of tobacco is now showing up, particularly the first two pullings of what we call Type 14, grown in Georgia, consisting of sun baked or dry weather tobacco. They did not have sufficient rain fall and that type of tobacco was of a very poor nature. Later on, now, they are selling further up the stalk. You are selling much better tobacco, and also better tobacco from up the country is showing up.

Judge Simpson: Well, the lugs come in first on any market?

[fol. 186] The Witness: Yes, sir.

Q. Mr. Narz, if, from California comes these early leaves which are of a lower quality and lower value—is that true?

A. The first few days, yes sir.

Q. And if they are sold on a Georgia market they could lower the average prices sold in this area between the Altamaha and Savannah River, but this lower average would not mean that anyone had been unfairly paid, would it?

A. No, sir.

Q. Lower averages of themselves does not mean that anyone was unfairly paid?

A. No, sir, it does not.

Q. Were you in court here yesterday, sir?

A. Yes, sir.

Q. You heard the witness, Sutton, on the stand, of the Farmers Warehouse?

A. Yes, sir.

Q. He testified, in effect, that the tobacco that was placed for sale on Thursday, the opening day in Statesboro, was finally sold on Monday, and it took about three days to get that out and that it finally moved out after the blue tags were taken off. Could you explain, aside from that statement of fact on his part, could you explain why it would happen that way?

A. Well, speaking from the standpoint of our company, [fol. 187] we are exclusively trying to buy Type 14. Now, some of the other companies have bought some of that other tobacco, and, of course, that particular tobacco was bought, a great deal of it, by "Ray Handless" and speculators. I would say that I did not see all the sales at Statesboro. I don't know whether I saw that particular warehouse because I travel five markets and I do not make them all in one day. I try to make them in two days.

Q. Mr. Narz, I will ask you this: You know the Brannen operations at Statesboro, don't you?

A. Yes, sir.

Q. You were here yesterday in court when it was said that the Brannen house had largely Georgia tobacco, but his average on that opening day was only about 48 or $49.00, even though he sold just about Georgia tobacco exclusively for that day, but the last day or two of this season selling this so-called mixed tobacco from the Carolinas and Georgia he has had sales averaging about $58.00 —do you understand that?

A. To this extent, yes sir.

Q. About $10.00 difference in it?

A. Yes, it could be that much very easily with the style of tobacco you are now selling with what you sold last week.

Judge Jones: That would be true whether it came from Georgia or South Carolina, wouldn't it?

[fol. 188] The Witness: Yes, sir, according to this style of tobacco. The type of tobacco now showing up is leaf tobacco and is a much better style of tobacco than they were selling.

Judge Simpson: Is it a high grade?

The Witness: Yes, sir, it is a high grade of tobacco, and some of the tobacco is received by the Stabilization and some the company bought.

Q. Are you saying that Type 14, meaning by geographical origin, is categorically superior grade for grade and government grade for corresponding government grade than that tobacco grown north of the Savannah river.

A. Our customers, both domestic and foreign trade, like Type 14. Now, whether it is on the other side of the river or not—this tobacco I am speaking of is grown in south Georgia and it is what they call old style type tobacco and has a good flavor and aroma and they use it in their blends and it is most necessary that this tobacco be bought according to the type so they can use it in their blends, both foreign and domestic.

Q. It would also be desirable on the part of Universal to buy tobacco nearer your plants and places of processing, wouldn't it?

A. Well, we have a corps of buyers in the South Carolina border belt which sells Type 13 and the same customers that we buy for here buys some tobacco there.

[fol. 189] Q. I may not have made myself clear. You would prefer to buy Carolina tobacco in Carolina rather than in Georgia?

A. That's right, but we desire to buy Type 14 in Georgia.

Q. You had rather buy it in Georgia?

Judge Jones: (Interrupting) By Type 14, you mean tobacco grown in Georgia?

The Witness: Yes, sir.

Q. The haul bill is not significant?

A. No, sir.

Q. Mr. Narz, I will ask you about this: Now, you cover these five counties between the two rivers, between the Altamaha and Savannah rivers, Statesboro, Swainsboro, Metter, Claxton and Vidalia—is that right?

A. Yes, sir.

Q. Coming within your knowledge there, during the first two days of this season, were there not instances of specu-

lators, who bought the farmers' tobacco, as blue tag tobacco, and has since then re-worked it and carried it, maybe, to South Carolina?

A. Yes, sir.

Q. For sale?

A. Yes, sir. That's what I heard. I saw them buy some [fol. 190] and I saw their names on it, yes sir.

Q. Now, you mentioned a moment ago with regard to Sutton's house, did you not, with regard to speculators buying up that tobacco, or some of it?

A. I don't think— You speaking of opening day now?

Q. Monday, sir?

A. I couldn't say whether I was in the Farmers Warehouse Monday or not.

Q. Now, on these speculators buying this blue tag tobacco, the blue tag has to remain on it until they cross the Savannah River with it. They can buy that as blue tag here in Georgia and haul it to the river and drop the tag in the river and resell in Carolina as what grade, sir, or as what tag?

A. Well, it would be graded in the Carolinas, and if it was graded in South Carolina it would be Type 13.

Q. The same tobacco, sir?

A. That's up to the government grader to put the type on it.

Q. It started out as Type 14, didn't it?

A. Oh, you mean grades. I don't know what grade he put on it.

Q. You talking about type, or grade, now?

A. Ask the question over, please?

Q. I said that a speculator could buy the blue tag to- [fol. 191] bacco in Georgia and take it back across the river and sell it as a speculative deal as Carolina tobacco?

A. I guess he could.

Judge Jones: Suppose it is grown in Georgia and taken across the river and sold, what type would it be in South Carolina?

The Witness: That would be, Judge—

Judge Jones: (Interrupting) Without any tag?

The Witness: That would be entirely up to the government grader.

Judge Jones: He doesn't type it, does he?

The Witness: He puts the type on the tag, Type 13, or Type 14, here in Georgia, and Type 12 in eastern Carolina.

Judge Jones: Is there any way you can determine by a physical and chemical examination whether the tobacco was grown north or south of the Savannah River?

The Witness: No, sir.

Judge Simpson: Well, can a chemist do it?

The Witness: A chemist could.

Judge Jones: You mean tell which side of the river it was grown on?

The Witness: Well, I don't know just how close to the river, Your Honor, but probably a distance away there could be a vast difference. Now, just across the line, I am not in a position to say.

[fol. 192] Q. Mr. Narz, have you called to the attention of the Secretary of Agriculture of the United States the problems of Universal in wanting to buy this Type 14 tobacco in Georgia?

A. Have I consulted with them?

Q. Have you, or your company—you work for the Universal?

A. Yes.

Q. Have you, or your company, called this problem to the attention of the Secretary of Agriculture of the United States, or sought any relief?

A. I haven't myself. I don't know what the officials of our company have done. I don't know whether our officials have or not.

Q. I understood, from your testimony, that you welcomed this Georgia Blue Tag Act of the Georgia Legislature as being a help to your company's business?

A. Yes.

Q. I wondered, if coming within your knowledge, there was any effort to get across to the federal government by way of seeking some relief or control? You can't testify as to that, sir?

A. No, sir. I cannot.

Mr. Neville: No further questions.

Judge Simpson: Excuse me. I would like to ask him [fol. 193] another question or two. Is the business of your particular business of your house, The Universal Leaf Tobacco Company, do you buy entirely for resale?

The Witness: No, sir.

Judge Simpson: Do you process or manufacture cigarettes or snuff or smoking tobacco?

The Witness: No, sir. We do not manufacture. We buy solely on orderly contracts, and also buy tobacco on speculation, that is, lay it aside.

Judge Simpson: Then you buy for resale?

The Witness: Yes, sir.

Judge Simpson: When you stated that it was your impression that a great deal of this blue tag tobacco finally moved on Monday, the first of August, from Sutton's Warehouse, was bought by what you call rehandlers or speculators. What I am trying to determine is whether you classify your company as a rehandler or a speculator, or whether your company is in the business of manufacturing the tobacco or storing it and manufacturing it later into cigarettes, or smoking tobacco, snuff or chewing tobacco?

The Witness: No, sir, we are not manufacturers.

Judge Simpson: Then you rehandle it for speculation?

The Witness: We are brokers and dealers.

Judge Simpson: All right, that's all.

[fol. 194] Judge Scarlett: What is the difference between a speculator and a broker or dealer?

The Witness: A speculator, he buys tobacco. For instance he will buy tobacco today and offer it for sale tomorrow. He may rework this pile of tobacco, or he may offer it for sale the same day. We buy tobacco and class it out and redry it and hold it.

Judge Jones: You don't rework it, do you?

The Witness: Yes, sir, we do.

Judge Scarlett: And hold it for a better price?

The Witness: Well, we hold it until we have a customer. Sometimes it is very profitable and sometimes it is not. Of course, if it wasn't profitable we couldn't stay in business very long.

Judge Simpson: Well, you might not call yourself a rehandler and a speculator, but some competitor of yours might apply that term, and you might call him one?

The Witness: Right, sir. There is no reflection when I call the gentlemen speculators.

Judge Simpson: Well, there is nothing wrong in buying anything for speculative profits, if you want to do that.

The Witness: That's right, sir.

Judge Simpson: All right, that's all.

[fol. 195] Mr. J. R. Williams, sworn for the defendants, testified.

Direct examination.

By Mr. Harrison:

Q. Will you state your name, please?

A. Joe R. Williams.

Q. Where do you live, Mr. Williams?

A. I live in Alexandria, Virginia.

Q. By whom are you employed, Mr. Williams?

A. United States Department of Agriculture.

Q. How long have you been so employed?

A. Five and a half years.

Q. In what capacity are you presently employed by the United States Department of Agriculture?

A. Director of the Tobacco Division of the Commodity Stabilization Service.

Q. Mr. Williams, what were the factors considered by the U. S. Department of Agriculture in establishing the various types of flue-cured tobacco?

A. Three things entered into it, geography, soil and climate.

Q. In other words, the types were not based entirely upon geography, nor entirely upon soil, nor entirely upon climate, is that true, sir?

A. That is correct.

Q. Mr. Williams, do the characteristics and properties [fol. 196] of Type 14 tobacco make it more desirable than other types of flue-cured tobacco?

A. Well, in the last five years, I would say yes, particularly in view of the variety troubles that we have had in the Carolinas and Virginia, whereas Georgia and Florida stuck primarily to the old line varieties of tobacco and recommended cultural practices with the possible exception of maybe last year in one belt. I think Georgia and Florida tobacco has had the reputation of being the best tobacco produced in the United States in the last five years. I think that is world wide.

Q. Mr. Williams, are the chemical properties of a pile of tobacco visible to the naked eye?

A. No, sir.

Q. Is the grading of tobacco under the Federal Tobacco Inspection Act based entirely on characteristics visible to the naked eye?

A. Yes, sir. That is the only way they can grade it.

Q. Mr. Williams, does the Georgia Identification Law of 1960 in any way affect the determination the grade of tobacco sold on the Georgia markets under the Tobacco Inspection Act?

A. No, sir. The tobacco is graded just the same on a blue card or a white card.

[fol. 197] Q. Mr. Williams, does the Georgia law that makes the identification affect any prices by which tobacco is supported by the Stabilization Program?

A. No, sir, it does not. We have a uniform price support on a grade of tobacco in all belts with a differential of five dollars for tied tobacco versus untied tobacco.

Q. In other words, you are saying that the federal grade is applied uniformly to all types of flue-cured tobacco?

A. That is right, yes.

Q. Mr. Williams, do the actions of the warehouseman, as required under the Georgia law, in placing on the warehouse floor on the individual ticket, identifying Type 14 tobacco from other types, constitute a grade determination in so far as the Federal Tobacco Program is concerned?

A. It does not.

Q. Mr. Williams, does the operations of the Georgia Tobacco Identification Law of 1960 conflict in any way with the duties of the U. S. Department of Agriculture, or

the administration thereof, under the Federal Inspection Act?

A. It does not.

Q. Sir?

A. It does not.

Q. Does the identification of the type of tobacco, as required by the Georgia Law, practice any deception as to any standard adopted by the USDA under applicable federal law?

[fol. 198] A. No, sir. It does not practice any deception. I think it clarifies it and denotes the types which we fail to do.

Q. Mr. Williams, is this a publication, an official publication of the U. S. Department of Agriculture?

A. Yes, sir.

Mr. Harrison: We would like to have this marked for identification.

The Clerk: It will be Defendant's Exhibit No. 1.

Q. Mr. Williams, I direct your attention to Page 4 of that publication. Does this map, which appears on Page 4 of this publication, correctly reflect the official determination of the Secretary of Agriculture as to the production areas of the various types of flue-cured tobacco?

A. Yes, sir.

Q. Mr. Williams, after examining that map, will the U. S. Department of Agriculture recognize as Type 14 any tobacco produced outside of the indicated areas?

A. I interpret this to be an official determination as to the geographical locations where the different types are produced. In other words, this is an official determination as to where the various types are produced, and officially any tobacco produced out of these areas would not be true to type.

OFFER IN EVIDENCE

Mr. Harrison: We want to tender this into evidence, may it please the Court.

[fol. 199] Judge Jones: Are you offering the map or the book?

Mr. Harrison: Both of them, Your Honor.

Judge Simpson: You are not interested in anything in the book except the map, are you?

Mr. Harrison: Primarily the map, sir.

Judge Jones: Well, just which is it now?

Mr. Harrison: We will offer the map, sir, to shorten the record.

Judge Jones: Well, without objection, let it be received and filed in evidence.

Mr. Harrison: You may examine the witness.

Cross examination.

By Mr. Neville:

Q. This geographical division on the map is done by the Secretary of Agriculture, sir, or by the Federal Government?

A. It is done by the Department of Agriculture. That particular map was done by the Agricultural Marketing Service under which the responsibility rest.

Q. These divisions, 11, 12, 13 and 14, do not relate to what the government considers the value of the tobacco to be?

[fol. 200] A. No, sir, not the value of the tobacco. It is the geographical identification of the various types and where they are produced.

Q. And more specifically, as we learned yesterday, they are really related to the geographical origin of the bright leaf and not the seed or baby plants?

A. I beg your pardon?

Q. I say, these geographical areas relate to the origin of the bright leaf, where the leaf is gathered in the field, where the harvest takes place, and not necessarily where the plants came from or the seeds by which that crop was made?

A. Maybe I don't follow you.

Q. I refer to North Carolina seed, Mr. Williams, being put in plant beds in Florida or south Georgia, and baby plants taken from there and planted all the way up the Seaboard into Virginia inclusive of the Carolinas, Georgia and Alabama and Florida. So, you start with North Caro-

lina seed, baby plants, taken from down here at the Georgia-Florida line and they are transplanted in the Carolinas, Virginia and wherever people want to plant them and then growing for some 60 or 90 days and then being harvested, so I say this type relates to where the ripe leaf is taken from the field?

A. The type relates to this: You can take any variety, any standard variety tobacco, Hicks, and take five differ-
[fol. 201] ent plants and plant them in each of the five belts and have a normal season and you will have a different tobacco chemical.

Q. The USDA doesn't think it is work any more, belt by belt, if it is of the corresponding grade and of the same variety. In fact, the USDA doesn't care if it is one variety or another.

A. Yes, we care about some varieties.

Q. Leaving out the discount varieties?

A. Well, under the law, we have to support it all at the same rate. We have to support it at 90 percent of parity, regardless of where it is grown.

Q. What is parity, Mr. Williams?

A. Parity, the concept of parity is a fair price for the farmer in exchange for the things that he has to buy. It was originally 1909 and 14 and has been modernized and brought up to date.

Q. It is intended to yield in the tobacco program 90 percent of what the fair price of that plant would be in that leaf?

A. It is to guarantee them that.

Q. And sometimes thought to be more theoretical than a practical process?

A. I think it has worked pretty well.

Q. Well, I don't want to digress on that. I have some-
[fol. 202] thing else I want to ask you.

A. All right, sir.

Q. Mr. Williams, I would like to ask you this: Now, there is no Federal Regulation against Georgia people taking their tobacco over into South Carolina to sell it, is there?

A. No, sir, but they would have to tie it.

Q. They would have to tie it?

A. Yes, sir.

Q. But assuming that they would tie it: If they have a superior tobacco you would have to surmise that on the Carolina Market that their quality would be recognized and they would have a commanding price over the Carolina leaf, wouldn't they? Would they get a super price for a super product if exposed to sale in Carolina?

A. No, sir. Even if you had a super quality I don't believe it would bring a super price, however the type, where it is grown, I think the companies naturally would prefer to buy the tobacco in the location where it is produced and it will bring the best price there.

Q. Your opinion then is that the companies are more interested in the geography than they are quality?

A. No, I wouldn't say that they are more interested in quality—I mean in geography than they are in quality, but I think they are interested in buying a uniform product [fol. 203] and put it in a uniform pack.

Q. Yes, sir. Mr. Williams, you actually personally favor this Georgia Blue Tag Law, don't you, and have encouraged its passage and adoption, haven't you?

A. I have not encouraged its passage.

Q. But you favor an identification law, such as this law or its equivalent, do you not?

A. I will say that I do not oppose it. It is not in conflict with our rules and regulations. I favor it to this extent: We are in a marketing mess, and if it will help solve that mess, this or anything else, I would be interested in it.

Q. All right. Have you called this marketing mess to the attention of the Secretary of Agriculture of the United States?

A. I have called it to the attention of the tobacco leadership in all of the five states.

Q. Go ahead, sir?

A. We have had the problem. It is something that has been going on year by year, and we have reached a crisis on the problem.

Q. Where have you reached the crisis, sir?

A. Well, I think we have reached the point that—here is the crisis: We set up government graders and inspectors and—

[fol. 204] Q. First, sir, tell me where this crisis exist and what states it exist in?

A. It exist in North and South Carolina and in Georgia and Florida.

Q. Now, are you undertaking to speak authoritatively that there is a crisis and to speak for the Secretary of Agriculture, or the Agriculture Department, or is this a personal opinion?

A. It is a personal opinion.

Q. You draw this opinion, based on your work, as you see your work related to the agriculture program as a whole?

A. That's right.

Q. Have you undertaken to indicate to the State of Georgia, or the Georgia Farm Bureau Federation, that the Georgia farmers would be saddled with a tobacco tied plant unless Georgia adopted some identification for its tobacco?

A. I have made this statement in all five states, among the agricultural leadership of the Carolinas, Georgia, Florida and all of them, that we have got a situation here where we have got a movement of 25,000,000 pounds of tobacco out of the Carolinas into Georgia, and—

Q. (Interrupting) Is that this year, sir?

A. No, sir, last year.

Q. Last year?

[fol. 205] A. Yes, sir, or maybe 24,000,000 pounds was the amount.

Q. All right, sir, go ahead?

A. I have made this statement, that we have reached a point where we are going to have to make a decision in one of three ways.

Judge Simpson: (Interrupting) Who is "we"?

The Witness: The tobacco leadership. This tobacco program has been built by farmers and their representatives and they have built it and maintained it by working together belt wide in all areas. It is a united program.

Judge Simpson: Now, tobacco leadership, you are speaking of farmers or producers and not the other phases of the tobacco industry?

The Witness: Well, I tell you, they have twenty one organizations—

Judge Simpson: (Interrupting) Well, just tell me who you mean by "tobacco leadership" and then go ahead with your answer.

The Witness: Well, the farm groups, warehouse groups —there are twenty one different organizations who work as a united front on tobacco legislation.

Judge Simpson: All right, go ahead with your answer.

The Witness: We have reached a point where we are [fol. 206] going to have to go one of three ways. We are going to have to sell all tobacco tied, or all tobacco loose, or find some way to keep tobacco from coming from the tied areas into the untied areas.

Q. All right, let me ask you this, sir: Have you been designated by the Secretary of Agriculture to work out the solution, or to apprehend if there is this crisis, or to avert this crisis?

A. I have been designated to work with the tobacco leadership and I have worked with them, pointing out any problems that we have in the program, and asking the leadership and the States to come up with an answer. It is far better if the tobacco leadership and the states will come up with the answers to these problems than for the federal government to do it.

Q. Were these your instructions, or were these your opinions?

A. It is my opinion. I don't have definite instructions as to the activity of the Tobacco Division.

Judge Jones: Could the Federal Government, under the existing law, require the tagging of tobacco, based upon the origin of it?

The Witness: I couldn't say, sir. We did do this: We are identifying it in Florida. After this law was passed, by regulations we put the same provisions in it at the request of the tobacco leadership of Florida. We put, by [fol. 207] regulation, in the Commodity Credit Corporation contract, loan program, requiring the same identification that was carried on in Georgia.

Judge Scarlett: Didn't you or some of the other witnesses testify that they had the same federal regulations as the state?

The Witness: I beg your pardon?

Judge Scarlett: Didn't either you, or some other witness—you were in court—testify that the government had the same regulation as the State?

The Witness: No. We adopted the Georgia Regulations in Florida.

Judge Scarlett: I am talking about the Federal Government. Do they have the same regulations that we have here in Georgia?

The Witness: No, sir, we do not.

Q. You mean in Florida, on the Florida Tobacco Markets, by regulation of the Department of Agriculture, they have adopted the Georgia Blue Tag Law?

A. Yes, sir, when the Georgia Law was passed, the Farm Bureau of Florida came in and appeared before the Secretary and requested that a provision be put in the contract, flue-cured tobacco stabilization contract, requiring for this year that the tobacco be identified. We put that into effect and it stayed into effect until this restraining order was issued here, and we simultaneously lifted that order be-
[fol. 208] cause we didn't want to have a regulation that was conflicting with a court order.

Judge Scarlett: Why did you just identify it in Florida? I mean how did you identify it in Florida, by the same methods?

The Witness: By the same methods, yes sir.

Q. As an incident to that contract down there in Florida, would you tell us whether very much Carolina tobacco or non Type 14 tobacco moves into Florida?

A. Not as much as in Georgia, but some, due to the distances.

Q. Is there any Florida market that would have as much as 50 percent of Carolina tobacco sold on it?

A. No, sir, it would not.

Q. They really have no problem, do they, about buyers becoming confused with out-of-state tobacco down there?

A. Yes, sir. They thought they had a problem. Identifying it in Georgia and not identifying it in Florida the tobacco could come right on through Georgia and crowd them off their markets down there.

Judge Scarlett: Would the tobacco go through Georgia to get down there to Florida?

The Witness: Would it?

Judge Scarlett: Yes, would it come through Georgia?

The Witness: Yes, sir.

[fol. 209] Judge Scarlett: Why?

The Witness: Well, if they have got it loaded and want to sell it, then they are going to where they can find floor space.

Judge Scarlett: Would it cost them more?

The Witness: Yes, sir, it would cost them more.

Q. You don't know the background as to why the Farm Bureau did this in Florida? You don't know what the Farm Bureau did in making its appearance before the Secretary or his representative?

A. I don't know the background of why they did it. They did it. I know what they said before the Secretary.

Q. Mr. Williams, I will ask you this, sir: The Secretary of Agriculture, as was said here yesterday, these 168 grades on flue-cured tobacco and—

A. (Interrupting) Yes, sir.

Q. Flue-cured tobacco is grown throughout, generally, the southeastern part of the United States, which areas have been designated type-wise as Types 11 through 14—am I correct on that?

A. That's right.

Q. As relates to your work in the Tobacco Division, in commodity services, how do you—what significance does Type 14 and Type 13 and so on through Type 11 mean to [fol. 210] you? Is that an administrative area?

A. No, sir. That is a distinct type by which tobacco is bought by the companies. This Universal man that you had here which is, I guess, the largest tobacco company in the United States, especially from a foreign trade standpoint, when they get an order they get an order for so many hogsheads of Type 14, or Type 11, or Type 12 tobacco.

Now, under our program, the government program, we sell tobacco and that is sold and billed and invoiced, not only by hogsheads but by grades and by types.

Q. You have got customers hunting types, but the government, through the application of the laws in Georgia, up through last year, reflected no effort on the part of the federal government to satisfy those customers' requirements as to type, did it, sir?

A. No, sir. It did not. Up until very recently we did not have an acute problem.

Q. Have what, sir?

A. An acute problem.

Q. Who determines that there has been an acute problem, sir?

A. I beg your pardon?

Q. Have you determined that there is an acute problem, or has the Secretary of Agriculture determined that there is an acute problem? I am trying to find—

[fol. 211] A. Yes, sir. I have determined that there is an acute problem.

Q. Have you been instructed by the Secretary of Agriculture to solve this problem?

Mr. Harrison: We ask the Court that the witness be permitted to answer the questions of counsel before others are propounded.

No Ruling.

A. I will say this: I have determined that we have got an acute problem for this simple reason; South Carolina wants to sell loose leaf tobacco. They want the Commodity Stabilization Corporation to support the price of a loose leaf tobacco just like we do in Georgia and Florida. Now, at the same time the industry unanimously say they do not and cannot buy additional tobacco in loose leaf form.

Judge Jones: Who is the industry?

The Witness: That's the manufacturers, both domestic and export. Now, that is the problem. We have got 40 percent of the flue-cured tobacco that goes into export trade, and nobody in export trade wants to buy tobacco in loose form, or tangle leaves, as you have it. Another problem that we have got, when you go to a loose form, if you took

ten percent of the crop, which would be 120,000,000 pounds, this year, under government loan, there isn't any company that we could contract with to handle this Stabilization stock [fol. 212] of tobacco and process and protect that collateral.

Q. Now, the State of Georgia is not going to come to your rescue if you get overburdened. What would the Secretary do about it? It would be his problem or that of the Congress, would it not?

A. I think it is the problem of the farmers. If we offer tobacco for sale in a form where we lose our export trade of forty percent. We would take reductions in allotments and then the farmers of Georgia, Florida and the Carolinas and all would take that reduction and be the overall sufferers.

Q. You have made the prediction, sir, and then I am sitting down, but you have made the prediction, or its equivalent, that Georgia farmers would be tieing their tobacco unless we got an identification law?

A. No, sir. I have not made the prediction. I have said the same thing in five states, and that statement was that we had three alternatives, and I have asked the leadership in the five states to come forward with some solution to the problem.

Q. The problem really involves not just Georgia blue tag but several states and the people and their crops, is that right, sir?

A. Well, I think it involves every tobacco farmer in the [fol. 213] flue-cured area.

Q. Over these several states?

A. Yes, sir.

Q. Thank you, sir.

Judge Scarlett: What did you say just now about the buyers wanted loose leaf tobacco?

The Witness: They do not want.

Judge Scarlett: They do not want it?

The Witness: No, sir, they do not want it. They say they cannot handle any more than they are handling at the present time.

Judge Scarlett: They might be the ones that started the whole situation. They do not want to buy any loose leaf tobacco?

The Witness: Any more of it.

Judge Scarlett: Why not?

The Witness: Their machinery is not geared to it. The first process that you have is the clipping of the tails and that type of thing where you have got to get your butts and heads altogether, and in tangled leaves in a sheet, why, it is just tangled leaves.

Judge Scarlett: When South Carolina tobacco is brought over here, it is tied? When it is brought over here to market it is tied?

The Witness: No, sir, it is loose.

[fol. 214] Mr. Neville: No further questions.

Judge Simpson: You said in your earlier direct testimony that the problem was started in the last five years because of variety troubles. Do you recall that statement?

The Witness: No. I didn't mean to say—in clarifying, they asked me about the quality of Type 14 tobacco, what I thought of it as being better than the other types and I said within the last five years, or intended to say, that during the past five years, due to the variety problems that you had in the other belts, that Type 14 had built a world wide reputation as being a superior tobacco.

Judge Simpson: All right. Now, you still classify these sub-standard grades—they only receive 50 percent support, that is that Coker 139 and 140 and Dixie Bright and 244. The government, in order to— When I say the government I mean the Department of Agriculture, the Secretary and his Agents, in order to tell whether or not a farmer is producing a sub-standard variety and puts a different colored marketing card on it when he goes to market with it, the government has to inspect that tobacco in the field?

The Witness: That's correct, sir.

Judge Simpson: They can't inspect it in the cured leaf and tell which it is without a chemical analysis, that's correct isn't it?

[fol. 215] The Witness: Yes, sir.

Judge Simpson: Now, the government does carry on such a program, as a witness whose testimony is incorporated into this record from a prior hearing, Mr. Spearman—he goes out in the fields and inspect those things?

The Witness: Yes, sir, that is true.

Judge Simpson: Wouldn't your variety troubles be at an end—you say that this has become a problem in the last five years because of variety troubles—these varieties came in about 1955—wouldn't the variety troubles or problems be at an end if you had sufficient field inspection of the crop in the growing stage?

The Witness: No, the varieties are not creating the problems. It is the heavy movement of tobacco from one belt to another belt.

Judge Simpson: Well, you went on to say that the Georgia and Florida producers had stuck to the old varieties, Hitch, and Broad Leaf and the old time tobacco varieties and that these people up through the Carolinas had not been as careful to do that?

The Witness: They had diseases up there.

Judge Simpson: Of course, these low growing nicotine tobaccos, or at least in some of them, are more disease resistant?

The Witness: That's true, yes sir.

[fol. 216] Judge Simpson: And that's one reason when they get a diseased field they want to go to that variety?

The Witness: Yes, sir.

Judge Simpson: But a Carolina farmer, if his crop has been inspected in the field and determined to be a substandard variety, why, he gets a different marketing quota card on there and he only gets fifty percent price support?

The Witness: Yes, sir.

Judge Simpson: Unless he is overlooked in your inspection? If you don't inspect him, you don't downgrade him?

The Witness: That's right. We identify the man that who use those varieties and we give him a card that indicates it and the warehouse puts it on the ticket.

Judge Simpson: That's right. And if it goes into support it only gets fifty percent instead of ninety percent?

The Witness: That's right.

Judge Simpson: But you wouldn't have any variety troubles, it doesn't seem to me, if the inspection program was large enough and sufficient to carry it out?

The Witness: Well, we have been very successful with the variety program. We have eliminated those three varieties. It is zero production in the Carolinas and everywhere.

Judge Simpson: That's all I have.
Judge Jones: You may step down.

[fol. 217] L. T. Weeks, sworn for the Defendants, testified.

Direct examination.

By Mr. Harrison:

Q. State your name, please, sir?
A. L. T. Weeks.
Q. Where do you live, sir?
A. Raleigh, North Carolina.
Q. In Raleigh, North Carolina?
A. Yes, sir.
Q. By whom are you employed?
A. The Flue-cured Tobacco Cooperative Stabilization Corporation, and for brevity sake I will refer to that as the Stabilization Corporation through the remainder of my testimony.
Q. In what capacity are you employed?
A. General Manager.
Q. Will you state briefly the functions and objectives of the Tobacco Stabilization Program?
A. The Tobacco Stabilization Corporation is a Tobacco Growers Cooperative Marketing Association, owned by the tobacco growers in the flue-cured area. Its purpose is to administer the government's price support.
Q. Approximately, how many members do you now have, sir?
A. 585,000.
Q. What does the Corporation do with the tobacco that [fol. 218] it purchases?
A. Sell it. That is the only thing that it can do.
Q. Sell it?
A. Yes, sir, that is the only thing that it can do is to sell it.
Q. Prior to 1960, did the Stabilization Corporation have or provide any way or means of identifying Type 14 tobacco from other types that it purchased on the Georgia Market?
A. No, sir.

Q. Does the Stabilization attempt to keep separate the different types of tobacco that it purchases?

A. Yes, sir.

Q. Why do they do so?

A. For the reason that when we sell the tobacco it all is purchased by types as an in grade basis within the type. As have already been pointed out here for manufacturing reasons or other reasons, both domestic and foreign, this is essential from our standpoint to keep it separate. If we did not keep it separate by type then our success would not have been what it has from sales standpoint over the period of years.

Q. Are you stating, sir, that the identification of types on tobacco sold in Georgia would aid the Stabilization?

A. Yes, I am.

Judge Jones: That Type 14, you are making a geo- [fol. 219] graphical classification rather than one based upon the quality of tobacco?

The Witness: Yes, sir, when I refer to Type 14 tobacco, I have reference to tobacco produced in Georgia, Florida and Alabama.

Q. Mr. Weeks, from your many years experience in the tobacco industry and Stabilizations, do you have an opinion as to what effect the continued sales on the Georgia Markets without identification as to types would have on Type 14 tobacco?

A. I do have an opinion, yes, sir.

Q. What is that opinion?

A. My opinion is that if the non-type 14 tobacco continues to increase progressively from year to year as it has done for the last two or three years then Type 14 will lose its full identity as such.

Judge Jones: Is that because of tied or untied or because of the place from which it grows?

The Witness: It would be for the characteristics, Your Honor, in my opinion, of the other tobacco as compared with the characteristics pointed out earlier by Dr. Senn, and I am basing this upon my experience in trying to sell the tobacco for the last fourteen years. It would be so much

of it involved there it would cause some of the values that has already been pointed out by the testimony this morning not to have the same value from dollars and cents standpoint.

[fol. 220] Judge Scarlett: Well, if it was still superior it would get the same price, wouldn't it? How would it deteriorate in prices, if it was still superior tobacco?

The Witness: Well, I want to make it clear, Your Honor. I haven't said that it was superior.

Judge Scarlett: Some of the other witnesses have said it was superior tobacco, as I recall, by aroma and flavor and so forth?

The Witness: But, in my opinion, what would happen it would be so co-mingled with the other it would pull the whole situation down.

Q. Mr. Weeks, what determines the support price of each pile of tobacco?

A. The grade put on it by the government inspector.

Q. You support all flue-cured tobacco based entirely upon grades?

A. Yes, sir.

Judge Jones: Without regard to type?

The Witness: Yes, sir.

Q. Mr. Weeks, from having observed the operation of the Georgia Tobacco Markets, are you familiar with the price trend usually followed on these markets?

A. In a general way, yes.

Q. Would you explain that trend, sir?

[fol. 221] A. Well, usually what has happened your leaves from the bottom part of the plant is marketed first, or predominately so, with some very minor exception and then as the market progresses, moves on through the season and the tobacco comes from up the stalk and on through the top, or tips, the market for the last few years, of course, there has been some exceptions to it in the last fourteen years that I have been in this area, but generally this is true, will increase and in some years, when they get into the very top part of the plant, what is known as the tip market, will have a decline sometimes. That has

not been a hundred per cent true, but is has been more times than not.

Mr. Harrison: Your witness.

Cross examination.

By Mr. Neville:

Q. Mr. Weeks, as near as I can make out, Stabilization keeps purchases separately and apart. I suppose, therefore, that you had two days of Type 14 that you could segregate from the rest of the season's purchases up to this point?

A. Yes, sir.

Q. That's your two days of blue tags, or white tags. Is that right, sir?

[fol. 222] A. How is that?

Q. I say, that's your two days of blue tags, or white tags, or which would really be two days of white tag buying by Stabilization that would have Type 14 on it?

A. July 28th and 29th they were segregated by a white tag on Type 14.

Q. So, what you would have to segregate in your bends or hogshead, or whatever you keep in it, would be the white tag Type 14 tobacco bought in Georgia on the first two days of the market?

A. We have, yes sir.

Q. How much of it did you buy, sir?

A. Of the type 14?

Q. Yes, sir?

A. I can tell you in just a moment, sir.

Judge Simpson: Of the white tag variety?

The Witness: Yes, sir. I can tell you in just a moment. 176,114 pounds.

Q. That came from the Georgia markets?

A. Yes, sir.

Q. You mean, sir—

A. (Interrupting) Georgia and Florida markets, Type 14 Tobacco.

Q. If I understood other witnesses here, Type 14 is [fol. 223] categorically more desirable than these other types. Now, what astonishes me, if that be true, you all bought 176,000 pounds that buying companies did not want on opening day? Will you explain that?

A. There is nothing unusual about that in this or in any other belt. We have always, all the years, received some tobacco, more or less.

Q. But it seems that there was about 176,000 pounds of Type 14 that is of a superior tobacco, if I understand your testimony and some of the other witnesses, that was not in and of itself desirable for companies to buy on opening day. Do you agree or disagree, sir?

A. I could not agree that it was not desirable to the companies. There are other factors that enter into the picture.

Q. Sir, isn't what we are talking about now is a very simple process—as the companies hurriedly buy this tobacco, seven or eight seconds to the basket, ultimately what places that basket of tobacco in Stabilization is whether or not the companies will pay more than you will pay for it?

A. Well, I wouldn't agree to that totally, but I will say this, that the tobacco that the Stabilization Corporation receives is tobacco that has failed to bring as much or more than the support price for a particular grade.

[fol. 224] Q. Yes, sir. That's what you buy?

A. We have always bought for fourteen years.

Q. So, what you are saying again is that out of this categorically superior Type 14 tobacco there was 176,000 pounds that did not bring as much as the government support price?

A. That's correct, it did not bring as much as the government support price.

Q. It would seem that out of Type 14 tobacco we would have some categories or some parcels that themselves are inferior?

A. Well, I don't say that any tobacco that the Stabilization bought out of two billion and a hundred and one million pounds was inferior tobacco, other than this discount variety stuff that we got back in 1955 and 1956, I

haven't said that any of them were inferior. We sold a billion and six hundred million pounds of what we received.

Q. Then you certainly would not say that north of the Savannah River that tobacco is categorically inferior?

A. I didn't say that any of it was inferior, sir.

Q. You would not agree even if it was implied by another witness, would you, sir?

A. No. I can't, when there is nothing wrong with the tobacco.

Mr. Neville: No further questions.

[fol. 225] Redirect examination.

By Mr. Harrison:

Q. Mr. Weeks, do you have any figures to reflect the percentage of Type 14 Tobacco that you now have in Stabilization?

A. I don't have those with me and I don't have it in my mind. I can say this, and this is a statement of fact; that the Type 14 tobacco, sale type 14 tobacco, in relation to total receipts from a percentage standpoint would compare favorably with other types.

Q. Would you state that by a comparison you have more or less Type 14 tobacco coming into Stabilization?

A. From a percentage standpoint in relation to total receipts the tobacco we pack in tangled leaves would run higher, and by tangled leaves I mean the tobacco that we receive in loose leaf form and did not stem.

Mr. Harrison: That's all.

Recross examination.

By Mr. Neville:

Q. I would like to know, or would like this information: What do you call the tobacco bought on the Georgia Markets now, since there is no blue or white tag? You are mixing it now, aren't you?

[fol. 226] A. No, we are not.

Q. Comingling it?

A. No. We are not mixing it totally. We kept separately the first two days the tobacco that was received under the blue tag from Type 14 tobacco under white basket tags. Since those first two days we have kept separately all tobacco received from these five markets that have been mentioned here this morning, and we pack them separately and will continue to keep them separately.

Q. To trace it back to who the seller was and who the grower was to know where it came from?

A. We do have those records.

Q. Is that the way you do it?

A. No, sir.

Judge Simpson: It is isolated by these five markets?

The Witness: By these five markets, yes sir.

Q. You are keeping that in a separate place?

A. Yes, sir. As a matter of fact, we are putting up three different lots of tobacco this season.

Q. I do have this question, sir: What have you done with the tobacco south of the Altamaha River that you acquired, even though you know that it contains some Carolina tobacco?

A. Well, I do not know that it did or did not contain [fol. 227] Carolina tobacco since those first two days.

Q. What you have actually done then is to take these five markets between the two rivers and you have got them somewhere, in some warehouses, separately and apart from the rest of the Georgia markets? Now, assuming—and this is right important—assuming that Carolina tobacco is sold south of the Altamaha River, all the way down to Adel, Hahira, Vidalia, Hazlehurst and all those other markets, those you are not holding separate and apart which contained comingled tobaccos put up here between the two rivers?

A. No. I am not, and the reason I am not is because 50 percent or more of all the Carolina tobacco is sold on these five markets and I would be able to distinguish that to any customer as to where the Carolina tobacco is, because, first, as I pointed out earlier, we can only sell the tobacco. That is one thing, and then under our contracts of relationship with the Commodity Credit Corporation

we are required to keep and maintain the tobacco in the best possible merchantable condition. If I failed to do that, then I would not be doing what is required of me to do.

Q. What did you call this comingled tobacco last year before all this blue tag came up?

A. It all has been packed as Type 14 tobacco.

Q. It was?

[fol. 228] A. Yes, it was.

Q. Even though it contained Type 12, 13 and 11?

A. Yes, it was.

Q. But you all called it Type 14?

A. Yes, for the reason we had no way of knowing.

Q. You represented it to your buyers as Type 14, did you not?

A. We represented it as tobacco sold in Georgia.

Mr. Neville: We have no further questions.

Mr. Harrison: We have no further questions for this witness, your Honor.

The Marshal: Come down.

Judge Jones: How many more witnesses do you have?

Mr. Harrison: Your Honor, we would like to ask for a five minutes recess and maybe we can shorten this testimony.

Judge Jones: We will take a five minutes recess.

The Marshal: Take a five minutes recess.

Note: At this point the proceedings were recessed from 11:35 until 11:43, A. M., at which time the proceedings were resumed as follows:

Mr. Harrison: Your Honor, for the information of the Court the waiver of venue by the defendants have been prepared and filed with the clerk.

Judge Jones: Very well.

[fol. 229] Mr. Harrison: Furthermore, your Honor, we have determined to limit our witnesses to one more witness, one remaining witness, and that is Mr. John Duncan, Jr., who is President of the Georgia Farm Bureau Federation, and in as much as Mr. Groover represents the Farm Bureau Federation, we would request permission of the court for Mr. Groover to interrogate the witness.

Judge Jones: All right, you may proceed.

Judge Simpson: That is Mr. Duncan, isn't it?

Mr. Harrison: Yes, sir. Mr. John Duncan, Jr.

Judge Scarlett: He testified on the other hearing.

Mr. Neville: If it please the Court, if the defendants have no objections, we note that the record of the proceedings contains the testimony of Mr. Duncan, the record of the testimony on the hearing last week, contains the testimony of Mr. John Duncan, Jr., and we will be pleased to stipulate that the record be used in interest of time and stand in place of his testimony today.

Mr. Groover: Your Honor, we prefer to interrogate the witness, who is here, on matters that have developed on the course of this trial and it will require different testimony, not a different version, but a more expanded version and we can do it more quickly.

Judge Jones: We will hear the witness.

[fol. 230] Mr. Groover: Your Honor, I have prepared and handed to the clerk an order allowing the intervention, and there are some interlineations and I apologize for it, and if the Court prefers, I will get it retyped.

Judge Scarlett: You can read it, can't you?

Mr. Groover: Yes, sir.

Judge Jones: It is satisfactory for it to be filed as is. You may proceed with the witness.

[fol. 231] JOHN DUNCAN, JR., sworn for the defendants, testified.

Direct examination.

By Mr. Groover:

Q. State your name?

A. John Duncan, Jr.

Q. Where do you live, Mr. Duncan?

A. Quitman, Georgia.

Q. What is your occupation?

A. President of the Georgia Farm Bureau Federation, and also a farmer.

Q. What kind of a farm do you operate?

A. Just general farming, tobacco, cotton and peanuts.

Q. How much tobacco do you grow?

A. Ten acres.

Q. Mr. Duncan, how long have you been President of the Georgia Farm Bureau Federation?

A. This is going on three years.

Q. What is the Georgia Farm Bureau Federation?

A. It is an Organization that represents the farmers.

Q. What is its membership composed of?

A. It is composed of farmers and others that would like to participate and back up our organization.

Q. What is the membership of the Georgia Farm Bureau?

A. Approximately 35,000. It could vary a 100 or a 150 either way.

[fol. 232] Q. Among that 35,000 can you estimate fairly accurate the number of members who are tobacco farmers?

A. It would have to be an estimate. I would say 15,000.

Q. In the area of Georgia that is covered by your membership, is tobacco a cash crop with farmers?

A. Yes, sir.

Q. Generally speaking, what is the percentage of his income, or how important, from a cash standpoint, is the allotment, his allotment of tobacco, that flows from tobacco?

A. It is very important. I wouldn't attempt to say. I wouldn't attempt to say what the percentage would be. It will vary.

Q. Is it important to him as a farmer?

A. Very important.

Q. Now, Mr. Duncan, the Georgia Farm Bureau Federation, does it interest itself in problems dealing directly with agriculture?

A. Yes, sir.

Q. Does it interest itself in legislation that affects the farmers?

A. Yes.

Q. Does the Georgia Farm Bureau Federation have any program or policy concerning as to what it does with reference to particular commodities during a given year?

[fol. 233] A. Yes, sir.

Q. How do you arrive at such policies and program?

A. We start in the fall of the year on a local level or communities. We ask that the different community chapters to submit resolutions to the County Chapter and then after that the County Chapters condense them and determine which is important to that particular county, and they in turn send these resolutions to the State Resolution Committee which convenes about two weeks before our annual convention. It is composed of the Board of Directors and Presidents of different county farm bureaus throughout the state. They take those and in three days time determine which are important and which ones we should pursue. Those recommendations then are carried before the annual convention, where the voting delegates are seated, and the voting delegates are based on the percentage of membership in a particular county. They discuss these at the convention and they are voted on whether to make these resolutions the policy of our organization. Once they are made a policy then it is my duty to carry them out.

Judge Jones: Counsel, might I interrupt to enquire where we are going with this line of questioning?

Mr. Groover: That particular question, Your Honor, was the background to show that a policy had been adopted by the Georgia Farm Bureau Federation with reference to this Act.

[fol. 234] Judge Jones: We are not concerned with the policy of this Bureau.

Mr. Groover: No, sir.

Judge Jones: Then why develop the question as to what its policy is?

Mr. Groover: I want to show to the Court the importance of this Act to a large section of the economy that is represented by the Georgia Farm Bureau which comprises most of the economy affected by this Act. What I will attempt to show by this witness, Your Honor, is knowledge of the tobacco market in Georgia by virtue of his own personal activity and its impact upon the farmers and the interest of the state in those farmers and the promotion of this legislation—its source.

Judge Jones: Go ahead.

Q. Mr. Duncan, have you, in your travels over the state, discovered anything with reference to whether the farmers were concerned about the status of the Georgia Tobacco Market prior to 1960?

A. I didn't get that question.

Q. Have you determined, from your travels over the state, anything with reference to whether or not a crisis existed in the Georgia Tobacco Market?

A. A definite crisis. Yes, I have.

Q. All right, has the Farm Bureau itself, taken any stand with reference to whether there is a crisis?

[fol. 235] Judge Jones: Are you attempting to show the legislative policy by this witness?

Mr. Groover: Your Honor, I am attempting to show that a large segment of our people in Georgia are tobacco farmers, as represented by the President of a group of which they are members, that this group promoted this legislation in order to protect their market and the identity of their tobacco, and to protect an economic resource of this state as a reasonable regulation.

Judge Jones: Just what they had in mind when they lobbied this legislation through, what has that got to do with the question that is before the court?

Mr. Groover: I think it will become important to the court to determine whether or not the regulations or law was necessary to protect an economic resource of the state, and if so, whether the state had—or whether it was reasonable within the police powers of the state.

Judge Jones: You are pulling opinion evidence out of this witness, which nobody has objected to, but it seems to me that so far you are just consuming the court's time with matters wholly irrelevant.

Mr. Groover: Well, I will try to get to the meat in the coconut, if Your Honor pleases.

Judge Jones: Well, then do that.

[fol. 236] Q. Mr. Duncan, have you made an investigation to determine how much tobacco, other than Type 14, have been sold on the markets of the State of Georgia in the last five years?

A. Yes, sir.

Q. Do you have those figures?
A. Yes, sir.
Give those figures to the court?

Judge Jones: Let me ask him what he regards as Type 14 tobacco?

The Witness: Your Honor, I am not an expert on this now.

Judge Jones: He is asking you a question about Type 14 tobacco, what do you understand he means by Type 14 tobacco?

The Witness: What the previous witnesses have testified to because they are the only source that I have.

Judge Jones: That tobacco grown in Florida, Georgia and Alabama?

The Witness: Yes, sir.

Judge Jones: You may go ahead.

Q. Will you give the court the figures in pounds of tobacco for the last five years that have been sold from other than what you understand Type 14 tobacco to be?

A. In 1955, there was nine percent of total sales of out-of-state tobacco, other than Type 14. It increased each [fol. 237] year until last year and it got up to 22,874,000 pounds, which was seventeen percent of the total tobacco sold on the Georgia and Florida Markets of out-of-state tobacco.

Q. As President of the Georgia Farm Bureau, have you been in contact and conversations with farmers and farm leadership, or farm leaders in other states outside of the State of Georgia engaged in marketing tobacco?

A. Yes, sir.

Q. From those conversations and that investigation, can you state to the court whether or not, in your opinion, there will be an increase in the amount of sales of other than Type 14 on the tobacco markets in Georgia?

A. I think definitely, if it is not identified.

Q. Now, from your investigation as President of the Farm Bureau and your familiarity with the problem, can you tell the court what, in your opinion, will be the impact of an increase of the sales of other than Type 14 on Georgia markets on Georgia Tobacco growers?

A. Well, I think we would definitely lose our identity, such as has already happened on the five markets in the northern part of the belt. I think if it continues to increase, and the farmers in Carolina tell me that they are going to increase it, that it will spread all over the state, and pretty soon there will be no identity of Georgia-Florida tobacco, [fol. 238] and I don't think the buyers will come down here and pay a premium that they are paying for Georgia tobacco, because that is what they come down here to buy, was Georgia tobacco, as testified to here this morning.

Q. As a result of that situation, would the Georgia grower receive less for his tonnage than he presently is?

A. Yes, sir.

Q. Mr. Duncan, would it in any way, in your opinion, affect the allotments that the Georgia growers would have?

Judge Jones: Is he qualified to answer that question?

Mr. Groover: I think he is, Your Honor.

Judge Jones: He has nothing to do with it.

Mr. Groover: Sir?

Judge Jones: He has nothing to do with fixing the allotments.

Mr. Groover: I think the amount of sale of tobacco, if Your Honor pleases, the amount of tobacco that has to go into Stabilization, and the amount of tobacco that is less in Stabilization would, in the end, affect the allotment.

Judge Jones: If he knows, he can answer it.

Q. Do you know, Mr. Duncan? Do you know whether it would affect the allotment?

A. If we eventually have to tie or untie our tobacco, I think it would affect our allotment.

[fol. 239] Q. What do you mean—it has been explained here about tied and untied tobacco, is that explanation in conformity with your understanding as to tied and untied tobacco?

A. Yes, sir.

Q. Is the tobacco in the Georgia belt tied or untied?

A. It is untied.

Q. As a tobacco farmer, could you economically and successfully tie your tobacco?

A. No, sir.

Q. Will you tell the court why you couldn't?

A. Well, we are only allowed approximately seventeen selling days here in Georgia, and you don't have time to get your tobacco in order to tie it. There are many times when a tobacco farmer will take his tobacco out of a tobacco barn and pack it up on a sheet and carry it to a sale. Sometimes it is even crisp where he hasn't had a chance, because of the short selling season; to get this tobacco in a tieable order, where he could tie it. It is impossible to tie tobacco in Georgia, I think.

Q. Does tobacco have to be limp, or can crisp tobacco be tied?

A. Crisp tobacco can't be tied. It will be crumbled all to pieces.

[fol. 240] Q. Is there an additional cost in the tieing of tobacco?

A. Yes, sir, that's common knowledge.

Q. Do you know how much more per pound it would cost?

A. No, sir. I never have had to tie it.

Q. Now, Mr. Duncan, as a result of the factors that you have mentioned before and your investigation and conversations with the officials of the Department of Agriculture, did you make any determination as to whether or not if Georgia did not have some identification it would be forced into tieing tobacco?

A. Well, Mr. Williams testified here that we had three alternatives—that we would have to tie it, or—

Judge Jones: (Interrupting) Well, don't quote Mr. Williams. If you can answer the question, answer it. We have got to get on with this case.

The Witness: You all are mixing me up a little bit. I don't quite understand.

Mr. Groover: I will withdraw the question.

Judge Scarlett: What do you mean by mixing you up?

The Witness: Breaking in on me.

Judge Scarlett: Well, that is the court's prerogative. Let me ask you a question, Mr. Duncan: What was the amount of the gross sales of tobacco last year?

[fol. 241] The Witness: I don't have those figures, Your Honor.

Judge Scarlett: Oh, I would guess about a hundred million pounds. It would have to be a guess.

Judge Scarlett: I mean in dollars and cents?

The Witness: Well, Sixty Five Million Dollars worth.

Judge Scarlett: That was without identification, wasn't it?

The Witness: That's right, it wasn't identified.

Judge Scarlett: All right. That was approximately, what you said?

The Witness: Yes, sir.

Mr. Harrison: The defense rest.

Judge Jones: Do you have any rebuttal evidence.

Mr. Neville: No, sir. We have nothing to offer in rebuttal, Your Honor.

Judge Jones: Very well, the evidence is closed.

(Note: After oral arguments on behalf of the plaintiffs by Mr. Durden, Mr. Brown and Mr. Neville, and oral arguments on behalf of the defendants by Mr. Harrison and an oral argument on behalf of the Georgia Farm Bureau Federation, Intervenor, by Mr. Groover, the oral proceedings were concluded, with the right of each side to file additional briefs.)

[fol. 242] Reporter's Certificate (omitted in printing).

[fol. 243] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SWAINSBORO DIVISION
Civil Action No. 326

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY, Plaintiffs,

vs.

PHIL CAMPBELL, COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, and CECIL ATTAWAY, Defendants.

OPINION—Filed November 10, 1960

Before Jones, Circuit Judge, Scarlett and Simpson, District Judges.

Jones, Circuit Judge:

The plaintiffs are owners or operators of tobacco auction warehouses in Swainsboro, Georgia, and in Statesboro, Georgia. They seek an injunction against the defendants, who are officials of the State of Georgia, to restrain the enforcement of certain of the provisions of an act for the regulation of the sale of flue-cured leaf tobacco passed by the General Assembly of Georgia, approved on March 7, 1960, and designated as Georgia Laws, 1960, pages 214 to 227, inclusive. The defendant, Phil Campbell, is the Commissioner of Agriculture of the State of Georgia, [fol. 244] and by the statute he is given the duty of enforcing its provisions. It is alleged by the plaintiffs that the defendant, Cecil Attaway, is the official of the Georgia Department of Agriculture in charge of the enforcement of the statutory provisions under attack. A temporary restraining order was entered by the district judge, Frank M. Scarlett. This district court of three judges was con-

stituted under 28 U. S. C. A. §§ 2821, 2824, for a determination of the cause. The defendants moved to dismiss the suit because of improper venue, but at the trial they filed a waiver of venue thus disposing of this issue. Freeman v. Bee Machinery Co., 319 U. S. 448, 63 S. Ct. 1146, 87 L. Ed. 1509, reh. den. 320 U. S. 809, 64 S. Ct. 27, 88 L. Ed. 489. The defendants also filed a motion to vacate the temporary restraining order. The plaintiffs, by motion, sought to have the defendants' motion to vacate made more definite. The district judge, Frank M. Scarlett, reserved for the determination of the full court the questions presented by the motion to make more definite. The district judge declined to enter an order vacating the restraining order. The trial of the cause on final hearing made unnecessary any consideration of or ruling upon the motion to make more definite. The disposition made on final hearing has the effect of affirming the district judge in not vacating the temporary restraining order.

[fol. 245] It is declared, in Section 1 of the Georgia Statute, that

> "It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this state to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama."

The Act imposes upon the operators of tobacco auction warehouses, where flue-cured tobacco is sold, the duty of placing a white tag upon each sheet of type 14 tobacco, and a colored tag[1] upon each sheet of tobacco other than type

[1] Designated as blue by the Commissioner of Agriculture.

14, with the requirement that such tags shall remain on the tobacco where placed until after it is sold. Noncompliance with the tagging provisions of the statute by a warehouseman is made a felony punishable by imprisonment of one to five years, or a fine of not more than $5,000, or both. The statute recites that it is the intent and purpose of the tagging provisions "to provide a means to positively identify type 14 tobacco and to require that types other than [fol. 246] type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State." These are the provisions of the Georgia Statute which the plaintiffs attack as contravening the Constitution of the United States and hence invalid.

In their complaint the plaintiffs charge that the statutory provisions mentioned, and the administration thereof constituted an unlawful discrimination in making classification of tobacco based solely upon geographical origin by requiring a white tag to be placed on all Georgia grown flue-cured tobacco and a blue tag on all flue-cured tobacco grown elsewhere. It was asserted that at the Statesboro and Swainsboro markets a high percentage of the tobacco sold, prior to the statute, was grown in South Carolina or North Carolina. It was averred that, with the tobacco being tagged as the Georgia Act required, the buyers declined to purchase the blue-tagged tobacco from the Carolinas except at prices much less than was being paid for the white-tagged Georgia grown tobacco. A demoralization of the market resulted, as appears from the complaint, and the Carolina tobacco, in considerable quantity, was returned to the Carolinas and the Carolina growers, for the most part, kept their tobacco away from the sales warehouses of the plaintiffs and off the Georgia markets. It was stated that the enforcement of the Act had resulted [fol. 247] in an unconstitutional impediment of the free flow of interstate commerce. The complaint recited that the tobacco brought to the warehouses for sale was inspected and graded prior to its sale by employees of the United States Department of Agriculture, acting under Federal law, who marked the grade of each pile of tobacco upon the identification tag of each pile of tobacco. Losses by the

plaintiffs were claimed, and other claims were made of greater losses threatened, as a result of the enactment and enforcement of the challenged statutory provisions.

The defendants answered. By their answer they denied that interstate commerce is burdened by the operation of the Georgia Act, or that the Act bases the identification by type of tobacco solely on geographical origin. In their answer the defendants asserted that the enactment and enforcement of the Georgia Act were in the valid exercise of the police power of the state. The answer contained admissions of some facts pleaded by the plaintiffs and the denial of others. The material facts as admitted, stipulated or established by evidence will be hereinafter referred to in the course of this opinion.

A petition to intervene as a defendant was filed by Georgia Farm Bureau Federation, Inc., and intervention was allowed. In addition to joining with the defendants originally named in defending the Georgia Act against the [fol. 248] attack made upon its validity, the intervenor has contended that the plaintiffs were without standing to raise the question of constitutionality.

At the beginning of the hearing the parties made the following stipulation:

> "1. That Complainants have invested approximately $750,000.00 for the construction and equipping of their tobacco auction warehouses on Swainsboro and Statesboro, Georgia, markets.
>
> "2. Said warehouses were built and equipped primarily as tobacco auction warehouses.
>
> "3. Defendant is enforcing the Act of the State of Georgia complained of according to its terms.
>
> "4. As an official standard of the United States the Federal Government has, under the Federal Tobacco Inspection Act, designated Types 11, 12, 13 and 14, known as flue-cured tobacco, and has designated as Type 14 tobacco only flue-cured tobacco grown in Georgia, Florida, and Alabama.
>
> "5. Under the Federal Tobacco Inspection Act the Federal Government has also established an official

standard of grades of tobacco, which are the official standard of grades of tobacco of the United States consisting of 168 different grades of flue-cured tobacco.

"6. The Secretary of Agriculture of the United States has, by proper Rules and Regulations, implemented the Federal Tobacco Inspection Act.

"7. For several years approximately 50 percent of the total tobacco sold on the Statesboro and Swainsboro, Georgia, Tobacco Markets was grown in North Carolina and South Carolina.

[fol. 249] "8. The United States Secretary of Agriculture designates tobacco auction markets, and under applicable laws, rules and regulations sales are limited to 440 baskets per hour per set of buyers, five hours per day and five days per week. Under the foregoing Statesboro has a maximum authorized sale of 4400 baskets of tobacco per day and Swainsboro 2200.

"9. Complainants show that the 1960 tobacco selling season opened in Georgia on July 28th, 1960, and sales were held on that date and on the 29th of July following; that large quantities of tobacco from North Carolina, South Carolina and Georgia were exposed for sale on said days; that the tobacco from the several states mentioned were all graded immediately prior to sale in the manner aforesaid and that such grades were assigned by official graders of the United States Department of Agriculture. The result of the sales for the two days mentioned revealed a disparity in price, offered or received for the tobacco from the Carolinas, bearing the blue identification tag mentioned and that of Georgia tobacco bearing the white tag mentioned. The said disparity on the whole was as much as $18.00 per hundred pounds in favor of the Georgia tobacco bearing a white tag as required by the Act complained of."

It is perhaps appropriate to observe at this point that, while parties may stipulate as to facts and, under some circumstances, may waive the benefit of constitutional or

statutory provisions, they cannot by stipulation fix or change the law. The construction of the statutes or regulations presents questions of law, and the courts will look elsewhere than to stipulations of the parties for the answers to such questions. Crabb v. Commissioner of Internal Revenue, 5th Cir. 1941, 121 F. 2d 1015. Thus we [fol. 250] will look to the Federal statute and regulations for the Federal standards of typing tobacco rather than to paragraph 4 of the foregoing stipulation.

The Tobacco Inspection Act, 7 U.S.C.A. §§ 511-511 q, was enacted in 1935. The purpose of the Act was thus stated:

> "Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein." 7 U.S.C.A. § 511 a.

To carry out the purpose of providing for uniform standards, the Act provided:

> "The Secretary [of Agriculture] is authorized * * * to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, * * *." 7 U.S.C.A. § 511 b.

Acting under this grant of authority, the Secretary of Agriculture promulgated regulations fixing standards for flue-cured tobacco. Divisions and sub-divisions of class, [fol. 251] type and grade are set up. "Class" is defined as being "A major division of tobacco based on characteristics caused by varieties, soils, or climatic conditions, and the method of cultivation, harvesting, or curing." 7 C.F.R. § 29.1040. The regulations define "Type" as:

> "A division of a class of tobacco having certain common characteristics and closely related grades. Tobacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination of the tobacco." 7 C.F.R. § 29.1096.

"Grade" is defined as "A subdivision of a type according to group and quality, and according to color when it is of sufficient importance to be treated as a separate factor." 7 C.F.R. § 29.1053. Another regulation provides that "Each grade shall be treated as a subdivision of a particular type and when the grade is stated in an inspection certificate the type shall also be stated." 7 C.F.R. § 29.1144.

The regulations define four types of flue-cured tobacco. Of these, we shall have occasion to refer to the following:

> Type 12. "That type of flue-cured tobacco commonly known as Eastern Flue-cured, New Belt of North Carolina Flue-cured, or Eastern Carolina Flue-cured, produced principally in the coastal plains section of North Carolina, north of the South River." 7 C.F.R. § 29.1098.
>
> [fol. 252] Type 13. "That type of flue-cured tobacco commonly known as Southeastern Flue-cured, South Carolina Flue-cured, or New Belt of South Carolina, produced principally in the coastal plains section of South Carolina and the southeastern counties of North Carolina, south of the South River." 7 C.F.R. § 29.1099.

> Type 14. "That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama." 7 C.F.R. § 29.1100.

The tobacco sold at the warehouses of the plaintiffs was nearly all purchased for shipment in interstate commerce. Hence the operation of the warehouses and the auctions held at them were in interstate commerce and subject to the provisions of the Tobacco Inspection Act. Currin v. Wallace, 306 U. S. 1, 50 S. Ct. 379, 83 L. Ed. 441; Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210.

The Georgia statute defines Type 14 tobacco on the basis of geographical origin and upon no other basis. If it is grown in Georgia, it would be Type 14 under the Georgia law and be given a white tag; while if it came from the other side of the Savannah River in South Carolina it would not be Type 14 and would be given a blue tag. This is the meaning of the statute and it was so construed and applied in practice. It is our considered conclusion that [fol. 253] the Federal regulation does not classify flue-cured tobacco on the basis of geographical origin and this conclusion is reached notwithstanding an apparent contrary view recited in the stipulation. The regulations classify tobacco as to types by referring to the designations by which the several types are "commonly known" and by the areas in which each of the commonly known types are "produced principally." Thus, as the regulations require, tobaccos which have the same characteristics and corresponding qualities, colors and lengths are to be treated as one type even though grown on different sides of a boundary between two states. The testimony of the defendants establishes that, in fact, tobaccos having the same characteristics and corresponding qualities, colors and lengths may be grown on both sides of the boundary line between Georgia and South Carolina.

Both the purpose and effect of the Georgia enactment were to make a distinction at the markets, by the color tags, between tobacco grown in Georgia and that grown elsewhere. The effect was to create a wide disparity of price

between the two groups of tobacco, the Carolina growers receiving a much lower amount. This resulted in losses of business to the plaintiff warehousemen. The Georgia statute imposes upon the producers of tobacco in other [fol. 254] states who bring their products into that state for sale onerous burdens which it does not impose upon Georgia growers. This is a discrimination in favor of the citizens of Georgia against the citizens of other states. It is a discrimination against goods in commerce grown outside of Georgia in favor of like commodities produced in that state. These discriminations result in an injury not only to the non-resident tobacco producers but to those engaged in the operation of the markets. The Federal Constitution forbids such discrimination as an unlawful interference with interstate commerce. Shafer v. Farmers Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909; 11 Am. Jur. 96, Commerce § 108. See Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275; Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213, 34 L. Ed. 862. The prohibition "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character." Welton v. State of Missouri, 1 Otto (91 U.S.) 275, 23 L. Ed. 347. Whether the discrimination is also a violation of the equal protection clause of the Constitution is a question which we need not decide. Cf. Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838, 81 L. Ed. 1223.

[fol. 255] There is another reason which, we decide, requires that the typing provision of the Georgia statute be held invalid as being repugnant to the Federal Constitution. It is our view that the Congress, by the Tobacco Inspection Act, has so occupied or preempted the field covered by the challenged portion of the Georgia statute that the latter cannot stand. The Federal Act recites that "without uniform standards of classification and inspection * * * unreasonable fluctuations in prices and quality determinations occur * * * . Such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative * * * ." 7 U.S.C.A. § 511 a. The Secretary of Agriculture, upon investigation, is authorized "to estab-

lish standards for tobacco by which its type, grades, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States * * * ." 7 U.S.C.A. § 511 b. This language shows the intent of Congress that there shall be a scheme of Federal regulation for the classification, grading and typing of tobacco so pervasive as to require the inference that, within this field, no room would be left for state action. Rice v. Santa Fe Elevator Corporation, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447; Missouri Pacific Railroad Co. v. Porter, 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672, Napier v. Atlantic Coast Line [fol. 256] Railroad Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; Oregon-Washington Railroad & Navigation Co. v. State of Washington, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482; Southern Railway Company v. Railroad Commission of Indiana, 236 U. S. 439, 35 S. Ct. 304, 59 L. Ed. 661; Note, 42 Va. L. Rev. 43. The Regulations of the Secretary of Agriculture carry out the statutory plan set forth by Congress.

We are unable to sustain the contention of the defendants that the questioned sections of the Georgia statute merely implement the Federal Act and regulations and are a valid exercise of the police power of the State. The Supreme Court has upheld the validity of a Georgia statute fixing maximum charges for handling and selling tobacco at auction warehouses, and rejected the contention that the state law was invalid because of occupation of the field by the United States in the enactment of the Tobacco Inspection Act. In so holding the Court stated the principle that furnishes us a guide to our decision. It was said:

> "We are thus brought to the final contention of appellants that the state law, although not in conflict with any exertion of federal authority, must fall as being repugnant to the existence of an exclusive federal power although unexercised. The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as demand a general system or uniformity of regulation; that in other matters, admitting of diversity of treatment according to the special requirements of local

conditions, the States may act within their respective [fol. 257] jurisdictions until Congress sees fit to act." Townsend v. Yeomans, supra.

In the case before us the Congress has found that uniformity of regulation as to classification was necessary, and the Congress has seen fit to act. This being so there can be no justification for the typing and tagging provisions of the Georgia statute under the police power. 11 Am. Jur. 86, Commerce § 94.

As has been shown, the typing classification as set up in the Georgia Act is purely geographical. Such a classification is in conflict with that of the United States. It has long been the rule that where state legislation conflicts with valid Federal regulation the former must fall. Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1. Kelly v. State of Washington, 302 U. S. 1, 52 S. Ct. 87, 82 L. Ed. 3. The provisions of the Georgia Act under scrutiny are not mere implementations of the Federal statute and regulations. They are in direct conflict with them.

As has been noted, the intervenor questions the right of the warehousemen to question the constitutionality of the Georgia statutory provision. We shall assume that the objection of the intervenor may properly be made. The Federal courts have ever been reluctant to pass upon the validity of state statutes when attacked as violative of rights guaranteed by the United States Constitution. Only those who have been injured as the result of a denial of [fol. 258] those rights can invoke Federal jurisdiction on constitutional questions. Voeller v. Nielston Co., 311 U. S. 531, 61 S. Ct. 376, 85 L. Ed. 322. The provisions which the plaintiffs assail directly bear upon them in the operation of their businesses. It is upon them that the act imposes the duty of placing the tags, white or colored, upon the tobacco. It is clearly established that compliance with these provisions has resulted in financial losses to the plaintiffs as well as to the growers from other states who desired to market their tobacco at the plaintiffs' warehouses. This being so, the plaintiffs may bring and maintain the action. 11 Am. Jur. 748, et seq., Constitutional Law § 111.

We are told that the Georgia statutory provisions are

necessary, and serve a beneficent purpose. With respect to a like contention the Supreme Court has said:

> "The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction • • • [rests] with Congress where the Constitution intends it shall be exercised with impartial regard for the interests of the people of all the states that are affected." Shafer v. Farmers Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909.

Having determined that the provisions of the Georgia statute under discussion cannot withstand the assault made upon them, judgment will be entered determining that such provisions are in conflict with the United States Constitution and enjoining the defendants from their enforce-
[fol. 259] ment. Other provisions of the Georgia statute are not before us and are not considered by us. This opinion will serve as findings of fact and conclusions of law. Judgment will be entered in accordance with the conclusions here reached.

Warren L. Jones, United States Circuit Judge;
F. M. Scarlett, United States District Judge;
Bryan Simpson, United States District Judge.

[fol. 260] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SWAINSBORO DIVISION
Civil Action No. 326

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY, Plaintiffs,

vs.

PHIL CAMPBELL, COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, and CECIL ATTAWAY, Defendants.

JUDGMENT—November 9, 1960

This cause having been heard and submitted upon the pleadings, stipulations, evidence and arguments of counsel; and the Court having determined, and does hereby determine and declare that those provisions of the Act of the General Assembly of Georgia approved on March 7, 1960, No. 557 (House Bill No. 717) and designated Georgia Laws 1960, pages 214 to 227, inclusive, which purport to require flue-cured tobacco sold at tobacco warehouses in the State of Georgia to be marked for identification as to whether it is or is not Type 14 tobacco as that [fol. 261] type is defined in said Act, are unconstitutional and invalid; and it appearing to the Court that the plaintiffs are entitled to the relief sought by them, it is therefore

Ordered, adjudged and decreed that the defendants and their successors in office and all others acting in behalf of them or either of them are hereby perpetually and permanently enjoined and restrained from enforcing or attempting to enforce the aforementioned provisions of the aforesaid Act; from enforcing or attempting to enforce,

by direct or indirect or other means, on any tobacco market in Georgia, any method, plan or device which identifies or tends to identify tobacco offered for sale as to its geographic origin, or which, in any manner distinguishes or differentiates between tobacco having its origin in Georgia, Florida or Alabama on the one hand, or in South Carolina or North Carolina on the other hand; and from making or requiring any distinction or differentiation on the tobacco markets between separate lots of tobacco by reason of any geographic origin or place of growth.

It is further ordered, adjudged and decreed that the injunction bond given by the plaintiffs upon the issuance of the temporary restraining order herein is hereby dissolved.

[fol. 262] Done this 9th day of November, 1960.

Warren L. Jones, United States Circuit Judge;
F. M. Scarlett, United States District Judge;
Bryan Simpson, United States District Judge.

[fol. 263] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SWAINSBORO DIVISION

[Title omitted]

NOTICE OF APPEAL OF GEORGIA FARM BUREAU FEDERATION, INC. TO THE SUPREME COURT OF THE UNITED STATES—Filed December 7, 1960

I. Notice is hereby given that the Georgia Farm Bureau Federation, Inc., Intervenor in the above-named case, hereby appeals to the Supreme Court of the United States from the judgment for plaintiffs and enjoining defendants entered in this action on November 9, 1960.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

II. The clerk will please prepare a transcript of the record in the cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The petition as amended, with preliminary restraining order.

(2) Answer.

(3) Petition of Georgia Farm Bureau Federation to intervene.

(4) Order allowing intervention by Georgia Farm Bureau Federation.

[fol. 264] (5) Stipulation of the parties.

(6) The stenographic report of evidence.

(7) Defendants' exhibit #1.

(8) Opinion and judgment of Court dated November 9, 1960.

(9) Notice of appeal.

III. The following questions are presented by this appeal:

(1) Do the identification provisions of the 1960 Georgia Act that are complained of impose a burden upon interstate commerce that is prohibited by the commerce clause of the Federal Constitution?

(2) Is the State of Georgia precluded under the Federal Tobacco Inspection Act from identifying, as to type, tobacco sold at auction within the State?

(3) Does the State of Georgia have the power to require the identification of leaf tobacco sold at auction within this State?

(4) May plaintiffs raise constitutional question?

It is the intention for this Notice of Appeal to operate as

a joint appeal with Phil Campbell, Commissioner of Agriculture, as provided by Rule 46 of the Supreme Court Rules.

Denmark Groover, Jr.

Bloch, Hall, Groover & Hawkins, P. O. Box 1353, Macon, Georgia.

[fol. 265] Proof of Service (omitted in printing).

[fol. 266] [File endorsement omitted]

In United States District Court

For the Southern District of Georgia

[Title omitted]

Notice of Appeal of Phil Campbell, Commissioner of Agriculture of the State of Georgia to the Supreme Court of the United States—Filed December 8, 1960

I. Notice is hereby given that Phil Campbell, Commissioner of Agriculture of the State of Georgia, the defendant above named, hereby appeals to the Supreme Court of the United States from the judgment for plaintiffs and enjoining defendants entered in this action on November 9, 1960.

This appeal is taken pursuant to 28 U.S.C.A. § 1253.

II. The clerk will please prepare a transcript of the record in the cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The petition as amended, with preliminary restraining order.

(2) Answer of defendants.

(3) Petition of Georgia Farm Bureau Federation, Inc. to intervene.

(4) Order allowing intervention by Georgia Farm Bureau Federation, Inc.

(5) Stipulation of the parties.

(6) The stenographic report of evidence.

(7) Defendants' Exhibit 1.

[fol. 267] (8) Opinion and judgment of Court dated November 9, 1960.

(9) Notice of appeal.

III. The following questions are presented by this appeal:

(1) Do the identification provisions of the 1960 Georgia Act that are complained of impose a burden upon interstate commerce that is prohibited by the commerce clause of the Federal Constitution?

(2) Is the State of Georgia precluded under the Federal Tobacco Inspection Act from identifying, as to type, tobacco sold at auction within the State?

(3) Does the State of Georgia have the power to require the identification of leaf tobacco sold at auction within the State?

(4) May plaintiffs raise constitutional question?

Eugene Cook, The Attorney General, G. Hughel Harrison, Assistant Attorney General, of Counsel for Defendants, Office and Post Office Address: State Judicial Bldg., Capitol Square, Atlanta 3, Georgia.

[fol. 268] Proof of Service (omitted in printing).

[fol. 270] Clerk's Certificate (omitted in printing).

[fol. 271]

SUPREME COURT OF THE UNITED STATES

No. 687, October Term, 1960

PHIL CAMPBELL, COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, et al., Appellants,

vs.

WILLIAM HUSSEY, JR., et al.

ORDER NOTING PROBABLE JURISDICTION—April 3, 1961

Appeal From the United States District Court for the Southern District of Georgia

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief setting forth the views of the United States.

April 3, 1961

Office Supreme Court, U.S.
FILED
JAN 31 1961
JAMES R. BROWNING, Clerk

...ARY
...RT. U. S.

No 682 42

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, Intervenor,
Appellants,
v.
WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

JURISDICTIONAL STATEMENT.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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Cases.

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No .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, Intervenor,
Appellants,

v.

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the three-Judge United States District Court for the Southern District of Georgia, Swainsboro Division, entered on November 9, 1960, determining and declaring so much of the Georgia Tobacco Identification Act, Georgia Laws 1960, pages 214 to 227, inclusive, approved March 7, 1960 (Ga. Code Ann., Ch. 111-2), as requires the identification of flue cured leaf tobacco sold at auction, to be unconstitutional and invalid

and granting injunctive relief against Appellant, Phil Campbell, Commissioner of Agriculture of the State of Georgia, and others, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the District Court for the Southern District of Georgia, Swainsboro Division, is not yet reported. A copy of the opinion of the District Court is attached hereto as "Exhibit A."

JURISDICTION.

This suit was brought under 28 U. S. C. A. § 1331 and 28 U. S. C. A. § 2284, for injunctive relief against loss and damage by violation of Article I, Section III, Paragraph III of the Constitution of the United States. The judgment of the District Court was entered on November 9, 1960, and Notice of Appeal was filed in that Court on November 29, 1960, and subsequently thereto, and within the time permitted by law, a subsequent Notice of Appeal was filed on December 7, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. C. A. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Townsend v. Yeomans, 301 U. S. 441, 57 Sup. Ct. 842, 81 L. Ed. 1210;

Shafer v. Farmers Grain Co., 268 U. S. 189, 45 Sup. Ct. 481, 69 L. Ed. 909;

Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835;

Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 112 L. Ed. 260.

QUESTIONS PRESENTED.

As stated in the Notice of Appeal, the questions presented are:

(1) Do the identification provisions of the 1960 Georgia Tobacco Identification Act that are complained of impose a burden upon interstate commerce that is prohibited by the commerce clause of the Federal Constitution?

(2) Is the State of Georgia precluded under the Federal Tobacco Inspection Act from identifying, as to type, tobacco sold at auction within the State?

(3) Does the State of Georgia have the power to require the identification of leaf tobacco sold at auction within the State?

(4) May plaintiffs raise constitutional question?

The basic question presented is whether or not the State of Georgia has such an interest in the flue cured leaf tobacco market in this State as to authorize the State to provide and require the identification of such tobacco as to type at the time of sale when in fact the Federal Tobacco Inspection Act, nor the Rules and Regulations promulgated thereunder, nor in its application, provide for such identification, so as to prevent a fraud upon the purchasers of such tobacco where no true identification as to type is indicated.

STATUTES INVOLVED.

Federal Tobacco Inspection Act, 7 U. S. C. A., § 511, et seq.;

Georgia Tobacco Identification Act, Georgia Laws 1960, pages 214 to 227, inclusive (Ga. Code Ann., Ch. 111-2), a copy being attached hereto as "Exhibit B."

STATEMENT.

Appellant, Phil Campbell, is Commissioner of Agriculture of the State of Georgia and is charged with the duty of enforcing the provisions of the Georgia Tobacco Inspection Act, Georgia Laws 1960, pages 214 to 227, inclusive (Ga. Code Ann., Ch. 111-2), hereinafter referred to as the Act. Appellant, Georgia Farm Bureau Federation, Intervenor, is a federation of Georgia Farm Bureaus having a substantial membership, and vitally concerned with the tobacco industry, and particularly the production and marketing of tobacco in Georgia.

Appellees are engaged in the business of operating warehouses for the sale of flue cured leaf tobacco at auction, and as such, have obtained licenses and otherwise complied with the provisions of the Act except to attack the identification provisions thereof. No attack has been made upon any provision of the Act other than the identification provisions thereof.

Under the Federal Tobacco Inspection Act (7 U. S. C. A., § 511, et seq.), provisions are made for regulating the marketing and grading of flue cured leaf tobacco. Under the provisions thereof flue cured leaf tobacco has been typed primarily upon the geographic area of production. According to the Regulations of the United States Secretary of Agriculture, Type 14, as typed thereunder, is limited to that tobacco produced principally in the State of Georgia, and to some extent in the States of Florida and Alabama. Under the testimony in the record of this case, Type 14 tobacco is not produced in any area other than the three named States (Transcript, p. 159), and in the trade, Type 14 is understood to be only that flue cured leaf tobacco produced in Georgia, Florida and Alabama (Transcript, p. 142). The Act substantially adopts the Federal definition in that it adopts the Federal definition, as ap-

plied in operation and as understood by the trade, and is not in conflict therewith, to the extent prohibited by law.

Under the Federal Tobacco Inspection Act, supra, grades are uniform throughout the types of flue cured leaf tobacco and are supported within grades without distinction or differentiation by tobacco stabilization. In actual operation, tobacco has been permitted to be labeled as to type based upon the place of sale, rather than reflecting the truth as to the origin and area of production. Emphasis has been and is placed upon ascertaining and indicating the grade of the tobacco in that grade determines the support price of the sheet of tobacco offered for sale. This practice has enabled warehousemen to sell tobacco under a misnomer in that no means was provided to indicate the truth as to the true type of the tobacco at the time of sale. This practice, developed over a long period of time, has resulted in a fraud being perpetuated upon the purchasers in that producers of other than Type 14 tobacco could bring their product into this State and sell it under circumstances and labels that indicated the tobacco to be Type 14 when in fact it was not. This discrepancy could not be ascertained at the time of sale and could only be ascertained at a time later than the sale. To correct this evil and detriment to the tobacco industry, the purpose of the Act was to identify tobacco, as to type, at the time of sale. The Act and the record in this case are replete with testimony to this effect.

The record establishes beyond question that the several types of tobacco have distinct chemical characteristics as well as distinct physical and internal properties, chemical content and burning characteristics. Suffice it to say that there is a sufficient difference in the types of tobacco to more than justify the demand for a distinct type. The record further establishes the desire of purchasers to know the true identity as to type of the tobacco purchased

in that the use to be made of the tobacco is largely governed by its chemical content and characteristics.

The production of flue cured leaf tobacco in Georgia is relatively new when compared to the production of flue cured leaf tobacco in the other States. The growth of the production and the marketing of the Georgia produced tobacco developed a unique marketing system, procedure, and dates, in that the tobacco was sold in "loose leaf" or "untied" form, and the marketing season began prior to the marketing of tobacco produced in other areas. This early marketing period placed the Georgia producers in the position of having to market their tobacco very soon after harvest and without the time provided in other marketing areas. These, and other reasons, have had the result of the State enacting legislation for the protection of this market and the producers.

Georgia Laws 1935, page 476, approved March 28, 1935 (Ga. Code Ann., Ch. 111-3), fixed a maximum charge for the selling and handling of leaf tobacco. Tobacco warehousemen contested this legislation before this Court in **Townsend v. Yeomans,** 301 U. S. 441, 57 Sup. Ct. 842, 81 L. Ed. 1210. This Court discussed at length certain phases of the marketing of tobacco in Georgia and approved that Act and made findings in relation thereto.

The General Assembly of Georgia determined by the 1960 Georgia Tobacco Identification Act that it was essential to require the identification of tobacco sold at auction in this State. The Act recites the purposes thereof and establishes the procedure to provide for such identification. The Act, in operation, has had the effect of saying to all who seek to ascertain the truth of the identity sold, as to type, what the type is, and nothing more.

Appellees' action in contesting the identification provision of the Act is an effort to strike down the action of

the General Assembly so as to enable them, as warehousemen and growers, to continue to operate their businesses in such manner as to conceal the truth concerning the type of the tobacco offered for sale by them. Appellees applied for and obtained a preliminary injunction, ex parte, from Honorable Frank M. Scarlett, District Judge, on Saturday, July 30, 1960, at 8:30 P. M., two days after the tobacco marketing season opened on July 28, 1960, and after Appellees had complied with the identification provisions of the Act during two actual selling days. This action came after certain of Appellees had obtained licenses, posted bond, conformed to the opening date requirement, and otherwise complied with said Act subsequent to the date of its approval by the Governor of Georgia on March 7, 1960. The Act was of force and effect from the date of its approval by the Governor.

Service was perfected upon Appellant, Phil Campbell, Commissioner of Agriculture of the State of Georgia, on Sunday, July 31, 1960. Efforts to obtain a dissolution of the preliminary injunction on that date were unsuccessful. A hearing was set and held on August 10, 1960, on said Appellant's motion to dissolve the preliminary injunction. After hearing, United States District Judge Frank M. Scarlett declined and refused to dissolve the preliminary injunction. Thereafter, on August 16 and 17, 1960, the case was heard by the three-Judge District Court and the decision was rendered and filed on November 9, 1960, determining and declaring the identification provisions of the Act to be unconstitutional and invalid and enjoining Appellants as set forth in that opinion.

THE QUESTIONS ARE SUBSTANTIAL.

The questions are substantial in that the authority of the State of Georgia to enact legislation to require the identification—to make the truth known—of a product sold

within its borders hinges upon a determination of these questions. The very existence of the tobacco market and the continued production of tobacco in Georgia rests upon these decisions. A multi-million-dollar business as well as the livelihood of thousands of tobacco farmers and other persons who work in the tobacco industry is placed in the balance of the scales of justice. The Appellees in this case, as warehousemen and as growers, are affected.

If the authority of the State of Georgia to require the identification of tobacco be held to be non-existent, then does not the authority to require the labelling or identification of other products become ipso facto questionable? Here, the State certainly has an interest in the tobacco industry, in its marketing, production and disposition, which is a local matter of great local concern and interest.

The Act, in question here, provides for the identification of tobacco, as to type, at the time of sale. Such identification has not been provided under the Federal Tobacco Inspection Act, nor by any other means. The Act seeks to disclose the truth concerning the origin of the tobacco sold. Here, geographic origin is merely an incidental part of the basis of identification and that part is clearly recognized, utilized, and established under Federal law. The Act merely implements and aids interstate commerce rather than imposing an unlawful burden thereon.

One of the issues involved in this Appeal is very similar to that raised in the case of **Cecil C. Clark and Catherine Clark v. Joe Dwyer, as Director of the Department of Agriculture of the State of Washington,** Case No. 531, October 1960 Term, U. S. Supreme Court, wherein this Court has denied certiorari to the Supreme Court of the State of Washington to review the decision of that Court. Appellants sought to review the decision of the Supreme Court of the State of Washington reported in 156 Wash. Decisions 440 and 353 P. 2d 941. In denying certiorari,

this Court indicated that the statute there relative to the grading of apples, which Appellants therein contended, among other things, imposed an undue burden upon interstate commerce, was a legitimate exercise of that State's police power. The Washington Court had held that the statute did not impose an undue burden upon interstate commerce even though it may incidentally or indirectly affect interstate apple shipment. The case at bar, it is submitted, involves a legitimate exercise of the State's police power, and to deny review in this case would result in a conflict in the action of the District Court for the Southern District of Georgia and the action upheld by this Court in the **Dwyer** case. In that case the issue was the validity of the statute of the State of Washington relative to the packing of apples. There, as here, the question is whether the police power of the State is broad enough to support the legislation—or to phrase the question another way—is the statute beyond or in exercise of the police power?

This Court has recognized the authority of the State of Georgia to enact legislation to regulate the sale of tobacco. **Townsend v. Yeomans,** supra. As was said by this Court in **Simpson v. Shepard,** 230 U. S. 352, at 408:

> "State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with federal rules, though they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the State and held for sale."

A substantial question is presented as to whether or not the State of Georgia may take cognizance of and take actions to require the identification of tobacco when it is established beyond dispute that the chemical character-

istics and properties of tobacco are affected greatly by the soil and climatic conditions of the area of production. These conditions result in the production of a desirable product that is in demand for specific uses when the identity can be ascertained with certainty. This is not to say that the product is any better than another, but the product, as such, is in demand for specific uses because of its specific characteristics and properties. The record discloses that the tobacco buyers go upon markets with instructions to purchase a given quantity of a specific type of tobacco for a specific use. No other type can be used. If the tobacco is bought under the assumption that it is as represented both as to grade and type, then is the purchaser not entitled to buy and receive the specific type of tobacco for specific use according to representations? Is the State prohibited, under any theory of law, from requiring that the truth be made known concerning **any** product sold within its borders—much less a product so vital to the economy of the State and a product the production of which affects such a large segment of the population of the State?

Further, a substantial question is presented as to whether the Appellees herein may raise the constitutional questions. They complied with the provisions of the Act as to identification during two actual selling days subsequent to the opening date of the 1960 Georgia tobacco marketing season. Prior thereto and subsequent to the approval of the Act by the Governor on March 7, 1960 (the effective date of the Act), the Appellees further complied with the provisions of the Act in obtaining licenses, bonds, weighing apparatus and paraphernalia, tickets, and otherwise. No protest nor complaint was made during this period of time —in excess of four months.

The ruling of the District Court holds that Appellees here are authorized to raise the constitutional questions because:

> ". . . It is clearly established that compliance **with these provisions**" (the identification provisions of the Georgia Tobacco Identification Act) "has resulted in financial losses to the plaintiffs. . . ."

This ruling is in direct conflict with the rule announced in **Excello Corp. v. City of Chicago**, 115 F. 2d 627, in which it was held:

> "Thus it is apparent that inevitable financial pecuniary damage is not the test of the sufficiency of plaintiff's interest, otherwise the right to sue might be extended indefinitely to parties far removed, such as workmen in plaintiff's factory whose wages are reduced or lost because of lack of realization of profits by their employer."

This is to be distinguished from the rule announced in **Currin v. Wallace**, 306 U. S. 1, affirming **Wallace v. Currin**, 95 F. 2d 856, where a warehouseman was held to be authorized to test the validity of the Federal Tobacco Inspection Act. There the warehouseman was permitted to raise the constitutional questions on the basis that he had a **right** to operate his warehouse **without** complying with the Act. Here Appellees have complied until an alleged indirect financial loss has made it desirable to no longer comply, making it apparent that the sole test is "financial pecuniary damage."

In **Mass. v. Mellon**, 262 U. S. 447, 67 L. Ed. 1078, the Supreme Court of the United States announces the rule as follows:

> "The party who invokes the power must be able to show not only that the Statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some **direct** injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally." (Emphasis supplied.)

The questions submitted are of such vital importance to the many persons affected that this Court should review the decision of the District Court in that that decision, it is submitted, fails to recognize the authority of the State under its police power, to enact legislation requiring the identification of tobacco sold within its borders. We believe that the questions presented by this Appeal are substantial and that they are of utmost public importance.

Respectfully submitted,

.....

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.....

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.....

DENMARK GROOVER, JR.,
Attorney at Law,
Counsel for Intervenor, Georgia Farm Bureau Federation,

Appellants.

710 Walnut Street Building,
Macon, Georgia.

EXHIBIT A.

In the United States District Court for the
Southern District of Georgia,
Swainsboro Division.

William Hussey, Jr., Aulbert J. Brannen, Sr., Aulbert J. Brannen, Jr., Robert B. Brannen, George C. Sugg, Ed Wiggins, Guy Sutton, Sr., Mrs. L. B. Willoughby, Plaintiffs, vs. Phil Campbell, Commissioner of Agriculture of the State of Georgia, and Cecil Attaway, Defendants.	Civil Action. No. 326.

Before Jones, Circuit Judge, Scarlett and Simpson, District Judges.

Jones, Circuit Judge.

The plaintiffs are owners or operators of tobacco auction warehouses in Swainsboro, Georgia, and in Statesboro, Georgia. They seek an injunction against the defendants, who are officials of the State of Georgia, to restrain the enforcement of certain of the provisions of an act for the regulation of the sale of flue-cured leaf tobacco passed by the General Assembly of Georgia, approved on March 7, 1960, and designated as Georgia Laws, 1960, pages 214 to 227, inclusive. The defendant, Phil Campbell, is the Commissioner of Agriculture of the State of Georgia, and by the statute he is given the duty of enforcing its provisions. It is alleged by the plaintiffs that the defendant, Cecil Attaway, is the official of the Georgia Department of Agriculture in charge of the enforcement of the statutory

provisions under attack. A temporary restraining order was entered by the district judge, Frank M. Scarlett. This district court of three judges was constituted under 28 U. S. C. A. §§ 2821, 2824, for a determination of the cause. The defendants moved to dismiss the suit because of improper venue, but at the trial they filed a waiver of venue thus disposing of this issue. Freeman v. Bee Machinery Co., 319 U. S. 448, 63 S. Ct. 1146, 87 L. Ed. 1509, reh. den. 320 U. S. 809, 64 S. Ct. 27, 88 L. Ed. 489. The defendants also filed a motion to vacate the temporary restraining order. The plaintiffs, by motion, sought to have the defendants' motion to vacate made more definite. The district judge, Frank M. Scarlett, reserved for the determination of the full court the questions presented by the motion to make more definite. The district judge declined to enter an order vacating the restraining order. The trial of the cause on final hearing made unnecessary any consideration of or ruling upon the motion to make more definite. The disposition made on final hearing has the effect of affirming the district judge in not vacating the temporary restraining order.

It is declared, in Section 1 of the Georgia statute, that:

> "It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this state to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown

in the traditional loose-leaf area which consists of the State of Georgia, Florida and Alabama."

The Act imposes upon the operators of tobacco auction warehouses, where flue-cured tobacco is sold, the duty of placing a white tag upon each sheet of type 14 tobacco, and a colored tag[1] upon each sheet of tobacco other than type 14, with the requirement that such tags shall remain on the tobacco where placed until after it is sold. Noncompliance with the tagging provisions of the statute by a warehouseman is made a felony punishable by imprisonment of one to five years, or a fine of not more than $5,000, or both. The statute recites that it is the intent and purpose of the tagging provisions "to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State." These are the provisions of the Georgia Statute which the plaintiffs attack as contravening the Constitution of the United States and hence invalid.

In their complaint the plaintiffs charge that the statutory provisions mentioned, and the administration thereof constituted an unlawful discrimination in making classification of tobacco based solely upon geographical origin by requiring a white tag to be placed on all Georgia grown flue-cured tobacco and a blue tag on all flue-cured tobacco grown elsewhere. It was asserted that at the Statesboro and Swainsboro markets a high percentage of the tobacco sold, prior to the statute, was grown in South Carolina or North Carolina. It was averred that, with the tobacco being tagged as the Georgia Act required, the buyers declined to purchase the blue-tagged tobacco from the Carolinas except at prices much less than was being paid for the white-tagged Georgia grown tobacco. A demoralization of the market resulted, as appears from the com-

[1] Designated as blue by the Commissioner of Agriculture.

plaint, and the Carolina tobacco, in considerable quantity, was returned to the Carolinas and the Carolina growers, for the most part, kept their tobacco away from the sales warehouses of the plaintiffs and off the Georgia markets. It was stated that the enforcement of the Act had resulted in an unconstitutional impediment of the free flow of interstate commerce. The complaint recited that the tobacco brought to the warehouses for sale was inspected and graded prior to its sale by employees of the United States Department of Agriculture, acting under Federal law, who marked the grade of each pile of tobacco upon the identification tag of each pile of tobacco. Losses by the plaintiffs were claimed, and other claims were made of greater losses threatened, as a result of the enactment and enforcement of the challenged statutory provisions.

The defendants answered. By their answer they denied that interstate commerce is burdened by the operation of the Georgia Act, or that the Act bases the identification by type of tobacco solely on geographical origin. In their answer the defendants asserted that the enactment and enforcement of the Georgia Act were in the valid exercise of the police power of the state. The answer contained admissions of some facts pleaded by the plaintiffs and the denial of others. The material facts as admitted, stipulated or established by evidence will be hereinafter referred to in the course of this opinion.

A petition to intervene as a defendant was filed by Georgia Farm Bureau Federation, Inc., and intervention was allowed. In addition to joining with the defendants originally named in defending the Georgia Act against the attack made upon its validity, the intervenor has contended that the plaintiffs were without standing to raise the question of constitutionality.

At the beginning of the hearing the parties made the following stipulation:

"1. That Complainants have invested approximately $750,000.00 for the construction and equipping of their tobacco auction warehouses on Swainsboro and Statesboro, Georgia, markets.

"2. Said warehouses were built and equipped primarily as tobacco auction warehouses.

"3. Defendant is enforcing the Act of the State of Georgia complained of according to its terms.

"4. As an official standard of the United States the Federal Government has, under the Federal Tobacco Inspection Act, designated Types 11, 12, 13 and 14, known as flue-cured tobacco, and has designated as Type 14 tobacco only flue-cured tobacco grown in Georgia, Florida, and Alabama.

"5. Under the Federal Tobacco Inspection Act the Federal Government has also established an official standard of grades of tobacco, which are the official standard of grades of tobacco of the United States consisting of 168 different grades of flue-cured tobacco.

"6. The Secretary of Agriculture of the United States has, by proper Rules and Regulations, implemented the Federal Tobacco Inspection Act.

"7. For several years approximately 50 percent of the total tobacco sold on the Statesboro and Swainsboro, Georgia, Tobacco Markets was grown in North Carolina and South Carolina.

"8. The United States Secretary of Agriculture designates tobacco auction markets, and under applicable laws, rules and regulations sales are limited to 440 baskets per hour per set of buyers, five hours per day and five days per week. Under the foregoing Statesboro has a maximum authorized sale of 4400 baskets of tobacco per day and Swainsboro 2200.

"9. Complainants show that the 1960 tobacco selling season opened in Georgia on July 28th, 1960, and sales were held on that date and on the 29th of July following; that large quantities of tobacco from North Carolina, South Carolina and Georgia were exposed for sale on said days; that the tobacco from the several states mentioned were all graded immediately prior to sale in the manner aforesaid and that such grades were assigned by official graders of the United States Department of Agriculture. The result of the sales for the two days mentioned revealed a disparity in price, offered or received for the tobacco from the Carolinas, bearing the blue identification tag mentioned and that of Georgia tobacco bearing the white tag mentioned. The said disparity on the whole was as much as $18.00 per hundred pounds in favor of the Georgia tobacco bearing a white tag as required by the Act complained of."

It is perhaps appropriate to observe at this point that, while parties may stipulate as to facts and, under some circumstances, may waive the benefit of constitutional or statutory provisions, they cannot by stipulation fix or change the law. The construction of the statutes or regulations presents questions of law, and the courts will look elsewhere than to stipulations of the parties for the answers to such questions. Crabb v. Commissioner of Internal Revenue, 5th Cir. 1941, 121 F. 2d 1015. Thus we will look to the Federal statute and regulations for the Federal standards of typing tobacco rather than to paragraph 4 of the foregoing stipulation.

The Tobacco Inspection Act, 7 U. S. C. A., §§ 511-511 q. was enacted in 1935. The purpose of the Act was thus stated:

"Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions

> are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein." 7 U. S. C. A., § 511 a.

To carry out the purpose of providing for uniform standards, the Act provided:

> "The Secretary (of Agriculture) is authorized * * * to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, * * *." 7 U. S. C. A., § 511 b.

Acting under this grant of authority, the Secretary of Agriculture promulgated regulations fixing standards for flue-cured tobacco. Divisions and sub-divisions of class, type and grade are set up. "Class" is defined as being "A major division of tobacco based on characteristics caused by varieties, soils, or climatic conditions, and the method of cultivation, harvesting, or curing." 7 C. F. R., § 29.1040. The regulations define "Type" as:

> "A division of a class of tobacco having certain common characteristics and closely related grades. Tobacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be le-

termined by an examination of the tobacco." 7 C. F. R., § 29.1096.

"Grade" is defined as "A subdivision of a type according to group and quality, and according to color when it is of sufficient importance to be treated as a separate factor." 7 C. F. R., § 29.1053. Another regulation provides that "Each grade shall be treated as a subdivision of a particular type and when the grade is stated in an inspection certificate the type shall also be stated." 7 C. F. R., § 29.1144.

The regulations define four types of flue-cured tobacco. Of these, we shall have occasion to refer to the following:

Type 12. "That type of flue-cured tobacco commonly known as Eastern Flue-cured, New Belt of North Carolina Flue-cured, or Eastern Carolina Flue-cured, produced principally in the coastal plains section of North Carolina, north of the South River." 7 C. F. R., § 29.1098.

Type 13. "That type of flue-cured tobacco commonly known as Southeastern Flue-cured, South Carolina Flue-cured, or New Belt of South Carolina, produced principally in the coastal plains section of South Carolina and the southeastern counties of North Carolina, south of the South River." 7 C. F. R., § 29.1099.

Type 14. "That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama." 7 C. F. R., § 29.1100.

The tobacco sold at the warehouse of the plaintiffs was nearly all purchased for shipment in interstate commerce. Hence the operation of the warehouses and the auctions held at them were in interstate commerce and subject to the provisions of the Tobacco Inspection Act. Currin v.

Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441; Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210.

The Georgia statute defines Type 14 tobacco on the basis of geographical origin and upon no other basis. If it is grown in Georgia, it would be Type 14 under the Georgia law and be given a white tag; while if it came from the other side of the Savannah River in South Carolina it would not be Type 14 and would be given a blue tag. This is the meaning of the statute and it was so construed and applied in practice. It is our considered conclusion that the Federal regulation does not classify flue-cured tobacco on the basis of geographical origin and this conclusion is reached notwithstanding an apparent contrary view recited in the stipulation. The regulations classify tobacco as to types by referring to the designations by which the several types are "commonly known" and by the areas in which each of the commonly known types are "produced principally". Thus, as the regulations require, tobaccos which have the same characteristics and corresponding qualities, colors and lengths are to be treated as one type even though grown on different sides of a boundary between two states. The testimony of the defendants establishes that, in fact, tobaccos having the same characteristics and corresponding qualities, colors and lengths may be grown on both sides of the boundary line between Georgia and South Carolina.

Both the purpose and effect of the Georgia enactment were to make a distinction at the markets, by the color tags, between tobacco grown in Georgia and that grown elsewhere. The effect was to create a wide disparity of price between the two groups of tobacco, the Carolina growers receiving a much lower amount. This resulted in losses of business to the plaintiff warehousemen. The Georgia statute imposes upon the producers of tobacco in other states who bring their products into that state for

sale onerous burdens which it does not impose upon Georgia growers. This is a discrimination in favor of the citizens of Georgia against the citizens of other states. It is a discrimination against goods in commerce grown outside of Georgia in favor of like commodities produced in that state. These discriminations result in an injury not only to the non-resident tobacco producers but to those engaged in the operation of the markets. The Federal Constitution forbids such discrimination as an unlawful interference with interstate commerce. Shafer v. Farmers Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909; 11 Am. Jur. 96, Commerce, § 108. See Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275; Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213, 34 L. Ed. 862. The prohibition "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character." Welton v. State of Missouri, 1 Otto (91 U. S.) 275, 23 L. Ed. 347. Whether the discrimination is also a violation of the equal protection clause of the Constitution is a question which we need not decide. Cf. Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838, 81 L. Ed. 1223.

There is another reason which, we decide, requires that the typing provision of the Georgia statute be held invalid as being repugnant to the Federal Constitution. It is our view that the Congress, by the Tobacco Inspection Act, has so occupied or preempted the field covered by the challenged portion of the Georgia statute that the latter cannot stand. The Federal Act recites that "without uniform standards of classification and inspection * * * unreasonable fluctuations in prices and quality determinations occur * * *. Such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative * * *." 7 U. S. C. A., § 511 a. The Secretary of Agriculture, upon investigation, is authorized "to estabilsh standards for tobacco

by which its type, grades, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States * * *." 7 U. S. C. A., § 511 b. This language shows the intent of Congress that there shall be a scheme of Federal regulation for the classification, grading and typing of tobacco so pervasive as to require the inference that, within this field, no room would be left for state action. Rice v. **Santa Fe Elevator Corporation**, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447; Missouri Pacific Railroad Co. v. Porter, 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672; Napier v. Atlantic Coast Line Railroad Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; Oregon-Washington Railroad & Navigation Co. v. State of Washington, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482; Southern Railway Company v. Railroad Commission of Indiana, 236 U. S. 439, 35 S. Ct. 304, 59 L. Ed. 661; Note, 42 Va. L. Rev. 43. The Regulations of the Secretary of Agriculture carry out the statutory plan set forth by Congress.

We are unable to sustain the contention of the defendants that the questioned sections of the Georgia statute merely implement the Federal Act and regulations and are a valid exercise of the police power of the State. The Supreme Court has upheld the validity of a Georgia statute fixing maximum charges for handling and selling tobacco at auction warehouses, and rejected the contention that the state law was invalid because of occupation of the field by the United States in the enactment of the Tobacco Inspection Act. In so holding the Court stated the principle that furnishes us a guide to our decision. It was said:

> "We are thus brought to the final contention of appellants that the state law, although not in conflict with any exertion of federal authority, must fall as being repugnant to the existence of an exclusive federal power although unexercised. The contention ig-

nores the principle that this ground of invalidity is to be found only with respect to such matters as demand a general system or uniformity of regulation; that in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act." Townsend v. Yeomans, supra.

In the case before us the Congress has found that uniformity of regulation as to classification was necessary, and the Congress has seen fit to act. This being so there can be no justification for the typing and tagging provisions of the Georgia statute under the police power. 11 Am. Jur. 86, Commerce, § 94.

As has been shown, the typing classification as set up in the Georgia Act is purely geographical. Such a classification is in conflict with that of the United States. It has long been the rule that where state legislation conflicts with valid Federal regulation the former must fall. Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, Kelly v. State of Washington, 302 U. S. 1, 52 S. Ct. 87, 82 L. Ed. 3. The provisions of the Georgia Act under scrutiny are not mere implementations of the Federal statute and regulations. They are in direct conflict with them.

As has been noted, the intervenor questions the right of the warehousemen to question the constitutionality of the Georgia statutory provision. We shall assume that the objection of the intervenor may properly be made. The Federal courts have ever been reluctant to pass upon the validity of state statutes when attacked as violative of rights guaranteed by the United States Constitution. Only those who have been injured as the result of a denial of those rights can invoke Federal jurisdiction on constitutional questions. Voeller v. Nielston Co., 311 U. S. 531, 61 S. Ct. 376, 85 L. Ed. 322. The provisions which the plaintiffs assail directly bear upon them in the operation of their

businesses. It is upon them that the act imposes the duty of placing the tags, white or colored, upon the tobacco. It is clearly established that compliance with these provisions has resulted in financial losses to the plaintiffs as well as to the growers from other states who desired to market their tobacco at the plaintiffs' warehouses. This being so, the plaintiffs may bring and maintain the action. 11 Am. Jur. 748, et seq., Constitutional Law, § 111.

We are told that the Georgia statutory provisions are necessary, and serve a beneficent purpose. With respect to a like contention the Supreme Court has said:

> "The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction * * * (rests) with Congress where the Constitution intends it shall be exercised with impartial regard for the interests of the people of all the states that are affected." Shafer v. Farmers Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909.

Having determined that the provisions of the Georgia statute under discussion cannot withstand the assault made upon them, judgment will be entered determining that such provisions are in conflict with the United States Constitution and enjoining the defendants from their enforcement. Other provisions of the Georgia statute are not before us and are not considered by us. This opinion will serve as findings of fact and conclusions of law. Judgment will be entered in accordance with the conclusions here reached.

s/ Warren L. Jones,
t/ United States Circuit Judge.

s/ F. M. Scarlett,
t/ United States District Judge.

s/ Bryan Simpson,
t/ United States District Judge.

In the United States District Court for the
Southern District of Georgia,
Swainsboro Division.

William Hussey, Jr., Aulbert J. Brannen, Sr., Aulbert J. Brannen, Jr., Robert B. Brannen, George C. Sugg, Ed Wiggins, Guy Sutton, Sr., Mrs. L. B. Willoughby, Plaintiffs, vs. Phil Campbell, Commissioner of Agriculture of the State of Georgia, and Cecil Attaway, Defendants.	Civil Action. No. 326.

Judgment.

This cause having been heard and submitted upon the pleadings, stipulations, evidence and arguments of counsel; and the Court having determined, and does hereby determine and declare that those provisions of the Act of the General Assembly of Georgia approved on March 7, 1960, No. 557 (House Bill No. 717) and designated Georgia Laws 1960, pages 214 to 227, inclusive, which purport to require flue-cured tobacco sold at tobacco warehouses in the State of Georgia to be marked for identification as to whether it is or is not Type 14 tobacco as that type is defined in said Act, are unconstitutional and invalid; and it appearing to the Court that the plaintiffs are entitled to the relief sought by them, it is therefore

Ordered, adjudged and decreed that the defendants and their successors in office and all others acting in behalf of them or either of them are hereby perpetually and permanently enjoined and restrained from enforcing or at-

tempting to enforce the aforementioned provisions of the aforesaid Act; from enforcing or attempting to enforce, by direct or indirect or other means, on any tobacco market in Georgia, any method, plan or device which identifies or tends to identify tobacco offered for sale as to its geographic origin, or which, in any manner distinguishes or differentiates between tobacco having its origin in Georgia, Florida or Alabama on the one hand, or in South Carolina or North Carolina on the other hand; and from making or requiring any distinction or differentiation on the tobacco markets between separate lots of tobacco by reason of any geographic origin or place of growth.

It is further ordered, adjudged and decreed that the injunction bond given by the plaintiffs upon the issuance of the temporary restraining order herein is hereby dissolved.

Done this 9th day of November, 1960.

s/ Warren L. Jones,
t/ United States Circuit Judge.

s/ F. M. Scarlett,
t/ United States District Judge.

s/ Bryan Simpson,
t/ United States District Judge.

EXHIBIT B.

State of Georgia.

Office of Secretary of State.

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify, that the eleven pages of photographed matter hereto attached contain a true and correct copy of Act No. 557 (H. B. 717) approved by the Governor on March 7, 1960, entitled "An Act to regulate the sale of flue-cured leaf tobacco in this State, to provide for identification of types of tobacco sold in this State, and for other purposes", as same appears of file and record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 24th day of January, in the year of our Lord One Thousand Nine Hundred and Sixty-One and of the Independence of the United States of America the One Hundred and Eighty-Fifth.

(Seal)

Ben W. Fortson, Jr.,
Secretary of State.

AN ACT

To regulate the sale of flue-cured leaf tobacco in this State so as to enable producers to have an adequate time to properly cure, prepare, and market flue-cured leaf tobacco; to provide a means of identifying all types of flue-cured leaf tobacco sold in this State and a procedure connected therewith; to provide for the licensing and bonding of operators of flue-cured leaf tobacco and a procedure connected therewith and a license fee; to provide for the bonding of operators of tobacco warehouses, the amount thereof, and the conditions of such bond; to provide the maximum charges and expenses of handling and selling

leaf tobacco in this State; to provide that statements of charges shall be submitted by the warehouseman to the seller of tobacco; to provide for records to be kept by licensee to show the origin and amount of tobacco sold by him and a procedure connected therewith; to provide for the duties of the Commissioner of Agriculture in compiling statistics relative to the sale of leaf tobacco; to create an advisory board and to provide its composition, the duties of the members thereof and their compensation; to provide for the setting of the opening date of the tobacco marketing season in this State and to provide a procedure connected therewith; to provide a minimum tobacco marketing season in this State and a procedure for the ceasing of operations of a warehouse prior to the expiration of the maximum selling season; to provide the maximum rate of sales of leaf tobacco by warehousemen; to provide a means of identification of flue-cured leaf tobacco as to types sold in this State and a procedure connected therewith; to provide a penalty for violating the provisions of Section 13 by a licensee; to provide for identification tags for use in marketing tobacco in this state; to prohibit the mixing of type 14 tobacco with any other type of tobacco and to prescribe a means for the sale of such mixed tobacco; to provide for the registration of purchasers of tobacco for resale and a procedure connected therewith; to provide for the duties of Commissioner of Agriculture in conjunction with the administration and enforcement of this Act; to provide for certification by weighers for the weighing of tobacco at each warehouse and a procedure connected therewith; to provide for the revocation or suspension of any license or registration issued hereunder after notice and hearing and a procedure connected therewith; to provide for injunctions and a procedure connected therewith; to provide for rules and regulations; to provide for judicial review of administrative determinations or decisions and a procedure connected therewith; to provide for appeals and a procedure connected therewith; to provide for the im-

pounding of records and commodities during investigation for violations of this Act and rules and regulations promulgated hereunder; to repeal Code Chapter 111-2 relating to statistics on leaf tobacco; to repeal an Act approved March 28, 1935 (Ga. L. 1935, p. 476), fixing a maximum charge for selling and handling leaf tobacco; to repeal an Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco; to define terms; to repeal conflicting laws; and for other purposes.

Be It Enacted by the General Assembly of Georgia:

Section 1.

It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida, and Alabama.

Section 2.

No person real or corporate shall operate, hold or conduct an auction sale for the sale of flue-cured leaf tobacco within this State without having first obtained a license for the year in which the sale is made from the Commissioner. The license shall be for the calendar year and the license fee shall be $10.00 per each calendar year and shall expire on December 31 of each year and be subject to renewal under such rules and regulations as the Commissioner shall prescribe.

Section 3.

As a prerequisite to the issuance of a license under the provisions of this Act, each applicant shall produce evidence to the Commissioner that he has in force for the calendar year for which license is sought a bond issued by a corporate entity authorized to do business in this State in the penal sum of $10,000.00. Such information shall show that the bond is in full force and effect and shall remain of full force and effect during the calendar year for which the license is sought. The bond shall be conditioned upon the licensee performing all the duties imposed upon him by law and the accounting for the proceeds of all flue-cured leaf tobacco received by him for sale and sold by him.

Section 4.

The maximum charges and expenses of handling and selling leaf tobacco by warehousemen licensed under this Act shall not exceed the following schedule, to-wit:

For auction fees, 15¢ on all piles or sheets of one hundred (100) pounds or less and twenty-five cents (25¢) on all piles or sheets over one hundred (100) pounds. For weighing and handling, ten cents (10¢) per pile or sheet for all piles or sheets of one hundred (100) pounds or less and ten cents (10¢) for each additional one hundred (100) pounds. For commissions on the gross sales of leaf tobacco in said warehouses not to exceed two and one-half per cent (2½%) of said gross sales.

Section 5.

The licensee of each and every warehouse shall render to each seller of tobacco of his warehouse an itemized statement plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commission on each sale.

Section 6.

Each licensee shall keep a correct daily account of the number of pounds of leaf tobacco sold upon the floor of his warehouse. On or before Monday of each week, the licensee shall make a statement under oath of all of the tobacco sold upon the floor of his warehouse during the preceding week and shall transmit each report to the Commissioner. The report shall be so arranged and classified as to show the number of pounds of tobacco sold for producers, the number of pounds sold for dealers, and the number of pounds resold by the licensee for his own account or for the account of some other warehouse or licensee. In addition thereto each licensee shall indicate the number of pounds of type 14 flue-cured leaf tobacco sold upon the floor of his warehouse for producers thereof and the number of pounds of type 14 flue-cured leaf tobacco sold by persons other than producers upon the floor of his warehouse. The licensee shall report the total number of pounds of other than type 14 flue-cured leaf tobacco sold for producers and persons other than producers. In addition thereto, each licensee shall make such additional reports as shall be prescribed by the Commissioner.

Section 7.

The Commissioner shall cause to be kept and compiled the information submitted to him as to the sales of tobacco in this State. He shall cause such records to be kept in a manner so as to show the number of pounds of type 14 tobacco sold by each warehouse as well as the number of pounds of other than type 14 tobacco sold by each warehouse. He shall cause such records to be kept in a manner so as to show separately the number of pounds of type 14 tobacco and other types sold by producers and the number of pounds of each type of tobacco resold. The Commissioner of Agriculture is authorized to cause such information to be published in a manner that he deems most beneficial.

Section 8.

To aid in the administration of this Act, there is hereby created an Advisory Board to be composed of nine (9) members. Three (3) members are to be members of the House of Representatives to be appointed by the Speaker of the House, and two (2) members are to be members of the Senate to be appointed by the President of the Senate. The members of the General Assembly shall be appointed from those members who are tobacco producers or in the absence of such producers in the General Assembly such members may be appointed from the members of the General Assembly who represent the flue-cured leaf tobacco producing counties and districts of this State. One (1) member shall be the Commissioner of Agriculture, ex officio, or his representative, who shall be Chairman of the Board. One (1) member shall be a flue-cured leaf tobacco producer to be appointed by the Commissioner of Agriculture. One (1) member shall be the President of the Georgia Farm Bureau Federation, or his representative. One (1) member shall be a member of the Georgia Flue-Cured Tobacco Warehousemen's Association to be appointed by the President of that Association. The appointive members shall serve at the pleasure of the appointing officer. The members of the General Assembly shall receive the per diem and expense allowance provided for committee work of the General Assembly and such sums shall be paid from the funds appropriated for the operation of the General Assembly. The other appointive members of the Board shall be compensated in the amount of $15.00 per day for each day in attendance of the duties of the Board and shall be reimbursed for the necessary expenses incurred in the performance of their duties from the funds of the Department of Agriculture. The Commissioner shall be reimbursed for his expenses incurred in the performance of his duties. The members of the Board shall not receive the per diem provided herein for more than seven (7) days per year.

Section 9.

The Board shall meet in June of each year, or upon call of the Chairman, to survey the condition of the tobacco crop and recommend an opening date of the marketing season. The Chairman shall determine the time and place of the meeting. The Board shall recommend to the Commissioner a date for the opening of the tobacco marketing season. If the Commissioner approves the opening date or if he deems it necessary for any other reason, he shall cause one or more members of the Board to attend the meeting of the Board of Governors of the Bright Belt Warehouse Association or its successors to make known the recommendation as to the opening of the marketing season in Georgia. If the Board of Governors of the Bright Belt Warehouse Association shall disapprove the recommended date or shall indicate an opening date for the tobacco marketing season in Georgia that is not in accordance with nor agreeable to the Tobacco Advisory Board or the Commissioner, the Commissioner shall determine the opening date of the tobacco marketing season in this state. If any licensee shall hold a sale prior to the date determined by the Commissioner, the license of the licensee shall stand revoked and shall not be reinstated or reissued in the calendar year of the revocation. The revocation provided herein shall be in addition to the other penalties provided for the violation of this Act. It is the intent and purpose of this section to provide a procedure for the fixing of the opening date of the tobacco marketing season and to place the final authority to fix said date in the Commissioner of Agriculture.

Section 10.

The flue-cured leaf tobacco marketing season shall continue for a minimum of twenty-seven (27) selling days after the opening date. The operating day of each flue-cured leaf tobacco warehouse shall not exceed five (5)

actual selling hours and operating week of each such warehouse shall be limited to five (5) actual selling days, provided that no sale shall be held on Saturday or Sunday.

Section 11.

If any warehouse has two (2) successive selling days during which the actual selling time is not more than one (1) hour each day, then that particular warehouse shall be permitted to cease its operations but not before two (2) days have passed after the days that the actual selling time has not exceeded one (1) hour per day. The Commissioner may authorize a warehouse to cease operations at an earlier date than that provided herein when the Commissioner determines that the ceasing of operations by the warehouse is in the best interest of the marketing of tobacco.

Section 12.

The maximum rate of sales at any such warehouse shall not exceed four hundred fifty (450) baskets during any one (1) hour nor shall the rate of sales during any one (1) day or week exceed four hundred and fifty (450) baskets per hour.

Section 13.

(A) As an aid in providing positive identification of type 14 flue-cured leaf tobacco, it shall be the duty of each licensee to furnish white identification tags to identify type 14 tobacco. It shall be the duty of each licensee to cause such white identification tags to be placed upon each sheet of type 14 tobacco received in his warehouse for sale by requiring that producers, at the time of the receipt of tobacco in the warehouse submit proof of the origin of the tobacco to be sold. No licensee shall receive from any producer any tobacco for sale unless the licensee receives proof in the form of marketing cards, or other identification measures issued by the United States Department of

Agriculture so as to definitely establish the origin of the tobacco. The licensee shall cause to be placed upon each sheet of type 14 tobacco a white sheet ticket that shall remain upon the sheet of tobacco at all times after receipt in the warehouse until after the sale of the sheet of tobacco and shall cause such ticket to have a carbon copy of the same color that shall remain with the sheet of tobacco at all times subsequent to sale, as well as prior to the sale, that the tobacco remains in this State.

(B) Each licensee shall cause to be placed upon each sheet of other than type 14 tobacco received by him for sale, at the time of the receipt thereof, a colored identification tag of a color prescribed by the Commissioner that shall be attached to and shall remain in a conspicuous place at or near the top of the sheet of tobacco in such manner as to show to any person who desires to ascertain the type of tobacco offered for sale, or held for sale, that the tobacco is other than type 14. It shall be the duty of each licensee to ascertain at the time of the receipt of the tobacco to ascertain from producers or others the origin of the tobacco offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type.

(C) Each licensee receiving tobacco from persons other than producers for sale shall require that the origin of the tobacco be proven to his satisfaction so as to enable the licensee to properly identify the type of tobacco.

(D) Any licensee who shall indicate or permit to be indicated upon his premises any tobacco as type 14 when, in fact, such tobacco is not type 14 or any licensee who shall violate the provisions of this Section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment of not less than one year nor more than five years and shall be subject to a fine of not more than $5,000.00 or both such fine and imprisonment.

(E) It is the intent and purpose of this Section to provide a means to positively identify type 14 tobacco

and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this state.

Section 14.

It shall be the duty of each licensee to provide identification tags of the color prescribed by the Commissioner for the use in marketing tobacco in his warehouse. Each licensee shall submit proof to the Commissioner prior to the opening of the marketing season, at a time prescribed by the Commissioner, of each year of an adequate supply of the identification tags required for the operation of his warehouse during the subsequent marketing season. Identification tags shall be of the size, color, number of carbon copies, shape and provide for information as shall be prescribed by the Commissioner.

Section 15.

Any person who shall purchase tobacco at auction for resale shall cause the tobacco so purchased to retain its identity as to type. Any person who shall mix type 14 tobacco with any other type of tobacco and who shall offer such mixed tobacco for sale shall cause such tobacco to be marketed and identified as other than type 14 tobacco. It shall be the duty of each purchaser for resale to retain the original identification ticket of each sheet of tobacco so purchased or a copy thereof and submit such sheets to the warehouse as a means of identification when the tobacco is offered for resale.

Section 16.

It shall be unlawful for any person to purchase tobacco for resale without having first registered with the Commissioner of Agriculture. There shall be no fee for such registration and the Commissioner is authorized to revoke,

suspend or cancel such registration after notice and hearing for any violation of this Act or any rule or registration promulgated hereunder.

Section 17.

The Commissioner, himself or through his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner in such manner as to accurately show the origin and disposition of each type of flue-cured leaf tobacco.

Section 18.

It shall be the duty of each licensee to provide a certified public weigher for the weighing of tobacco upon his premises and it shall be unlawful for any person to weigh tobacco for sale who is not a certified public weigher.

Section 19.

It shall be the duty of the Commissioner to enforce the provisions of this Act and to utilize any employee of the Department of Agriculture in the performance of his duties hereunder. The Commissioner is authorized to revoke or suspend any license or registration issued hereunder after notice and hearing before the Commissioner.

Section 20.

In addition to the remedies provided herein and notwithstanding the existence of any other remedy of law and notwithstanding the pendency of any criminal prosecution, the Commissioner is authorized to apply to the Superior Court and such Court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction or an Ex parte restraining order restraining or enjoining any person from violating or continuing to vio-

late any of the provisions of this Act or for the failure or refusal to comply with the provisions of this Act or any rule or regulation promulgated hereunder. Such injunction shall be issued without bond.

Section 21.

(a) Prior to adoption or change of any rules and regulations, the Commissioner shall promulgate the proposed promulgation or change and afford interested persons an opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule and regulation of the Commissioner who believes that the Commissioner in the promulgation or enforcement of such rule or regulation has exceeded the authority vested in him by the General Assembly under the Constitution of Georgia or United States shall have the right to petition the Commissioner for the repeal or rejection of such rule or regulation by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within thirty (30) days, and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within thirty (30) days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy and every person affected by any rule or regulation or any Act of the Commissioner is required to exhaust this remedy before taking any other steps.

(c) All hearings before the Commissioner shall be stenographically reported and shall be available to any interested party upon payment of the stenographic cost.

Section 22.

(a) Procedure.

(1) Any person aggrieved by a final decision or determination in any matter in which a hearing is required or authorized by this Act or by the State or Federal Constitution is entitled to judicial review thereof, provided that the judicial review herein afforded shall be exclusive judicial remedy for review of such decision or determination.

(2) Proceedings for review shall be instituted by filing a petition in the superior court of the county in which the Commissioner resides, within thirty (30) days after service of the final decision or determination of the Commissioner. Copies of the petition shall be served upon the Commissioner and all other parties of record. The court in its discretion may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the Commissioner's decision; but the Commission may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within thirty (30) days after service of the petition, or within such further time as the court may allow, the Commissioner shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in

the proceeding before the Commissioner, the court may order that the additional evidence be taken before the Commissioner upon such conditions as the court may deem proper. The Commissioner may modify his findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modification or new findings or decision.

(b) Scope of review.

(1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the Commissioner, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(2) The court may affirm the decision of the Commissioner or remand the case for further proceedings before the Commissioner; or it may reverse or modify the decision or compel action unlawfully withheld, if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the Commissioner or affected by other error of law; or

(c) made upon unlawful procedure; or

(d) unsupported by substantial evidence as weighed in view of the entire record as submitted; or

(e) arbitrary or capricious.

(c) Appeals procedure. An aggrieved party may secure a review of any final judgment of the superior court under this Act by writ of error to the appropriate appellate court.

Section 23.

At such time as the Commissioner deems there has been a violation of this Act and the rules and regulations promulgated hereunder, he shall have the power and authority to suspend the license or registration pending investigation of such violation and until such time as the violation has been corrected to the satisfaction of the Commissioner. During the period of time of any investigation of a violation, the Commissioner shall have the power and authority to impound all books and records and to preserve and maintain evidence until investigation is completed. Provided, however, that the investigation shall be completed at the earliest practicable time.

Section 24.

Code Chapter 111-2, relating to statistics on leaf tobacco is hereby repealed in its entirety.

Section 25.

An Act approved March 28, 1935 (Ga. L. 1935, p. 476), fixing a maximum charge for selling and handling leaf tobacco is hereby repealed in its entirety.

Section 26.

An Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the Sale of flue-cured leaf tobacco, is hereby repealed in its entirety.

Section 27.

Any person who shall violate any provision of this Act for which no specific punishment is provided herein shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

Section 28.

All laws and parts of laws in conflict with this Act are hereby repealed.

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No. 42.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

(No. 687, October Term, 1960.)

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, INC., Intervenor,
Appellants,

v.

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

BRIEF FOR THE APPELLANTS.

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Appellants,

v.

WILLIAM HUBBEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

BRIEF FOR THE APPELLANTS.

OPINION BELOW.

The Opinion of the United States District Court for the Southern District of Georgia, Swainsboro Division (R. 153-164) is reported at 189 F. Supp. 54.

JURISDICTION.

The jurisdiction of this Court to review the decision of the United States District Court by direct appeal is conferred by 28 U. S. C. A. 1253. The Opinion of the District

Court was entered on November 9, 1960 (R. 153-164). The Judgment of the District Court was entered on November 9, 1960 (R. 165-166). The Notice of Appeal of Georgia Farm Bureau Federation, Inc., was filed December 7, 1960 (R. 166-168). The Notice of Appeal of Phil Campbell, Commissioner of Agriculture of the State of Georgia, was filed December 8, 1960 (R. 168-169). This Court noted probable jurisdiction and transferred the case to the Summary Calendar on April 3, 1961 (R. 170).

STATUTES INVOLVED.

Federal Tobacco Inspection Act, 7 U. S. C. A., § 511, 511q, set forth in Appendix as Exhibit "A";

Georgia Tobacco Identification Act, Georgia Laws 1960, pages 214 to 227, inclusive (Ga. Code Ann., Ch. 111-2), set forth in Appendix as Exhibit "B."

QUESTIONS PRESENTED.

The questions presented for review by this Appeal are:

(1) Do the identification provisions of the 1960 Georgia Tobacco Identification Act that are complained of impose a burden upon interstate commerce that is prohibited by the commerce clause of the Federal Constitution?

(2) Is the State of Georgia precluded under the Federal Tobacco Inspection Act from identifying, as to type, tobacco sold at auction within the State?

(3) Does the State of Georgia have the power to require the identification of leaf tobacco sold at auction within the State?

(4) May appellees (plaintiffs below) raise the constitutional question?

STATEMENT.

The appellees filed their complaint in the District Court on July 30, 1960 (R. 1-11), seeking injunctive relief against appellant Phil Campbell as Commissioner of Agriculture of the State of Georgia. On the same date a preliminary restraining order was entered (R. 11-13) granting the relief sought pending hearing and determination of the issues. Thereafter, appellant, Georgia Farm Bureau Federation, Inc., filed its motion to intervene as a defendant (R. 19-21). After hearing, the three-judge District Court perpetually and permanently enjoined appellant Phil Campbell, Commissioner of Agriculture of the State of Georgia from enforcing the identification provisions of the Georgia Tobacco Identification Act.

The District Court determined and declared the identification provisions of the Georgia Tobacco Identification Act to be unconstitutional and invalid.

No attack has been made on other provisions of the Georgia Act and the appellees, who are warehousemen, have complied with the provisions of the Georgia Act pertaining to license, bonds, weighers, maximum fees and other provisions relative to the sale and reporting of sales of flue cured leaf tobacco at auction.

Under the Federal Tobacco Inspection Act, provisions have been made and regulations of the Secretary of Agriculture have been issued providing a basis of determining the various types and grades of flue cured leaf tobacco. Type 14 flue cured leaf tobacco has been defined by the Secretary of Agriculture as "That type of flue cured tobacco commonly known as southern flue cured or New Belt of Georgia, Florida and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama." (7 C. F. R. § 29.1100).

The record shows that the Secretary of Agriculture has officially determined the production areas of the various types of flue cured tobacco and that tobacco produced in one of the areas and sold or moved in an area other than the area of production, without disclosing the type applicable to the area of production, would not be true to type (R. 125).

The General Assembly of Georgia, as recited in Section 1 of the Georgia Act (R. 154), found it essential and necessary in the proper marketing and identification of flue cured leaf tobacco that a positive means of identification of tobacco, by type, at the time of sale, be provided. In the same section of the Act, Type 14 tobacco is defined in the following language:

> "Type 14 flue cured leaf tobacco as used herein shall mean that flue cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida and Alabama."

Section 13. (E) of the Georgia Act, 1960 Georgia Laws, page 221, provides:

> "13. . . .
>
> "(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State."

To accomplish this identification, the Georgia Act required each tobacco warehouseman to determine the origin of the tobacco at the time of the receipt of the tobacco offered for sale and to identify Type 14 tobacco by the use of a white tag. The warehouseman was required to identify other than Type 14 tobacco by the use of a colored tag (designated by the Commissioner of Agriculture of the

State of Georgia as blue). Such tags were to remain with the sheets of tobacco at all times while the tobacco remained in the State of Georgia. Other means were provided for the identification of tobacco offered for resale.

The District Court held (R. 160) that the Georgia statute defines Type 14 tobacco on the basis of geographical origin and upon no other basis, and further that both the purpose and effect of the Georgia enactment were to make a distinction at the markets by the color tags between tobacco grown in Georgia and that grown elsewhere. After holding that the Georgia statute imposed upon the producers of tobacco in States other than Georgia onerous burdens which it did not impose upon Georgia growers (R. 161), the Court held that the Federal Constitution forbids such discrimination as an unlawful interference with interstate commerce. The District Court further held (R. 161) that the Congress, by the Federal Tobacco Inspection Act, had so occupied or preempted the field covered by the challenged provisions of the Georgia statute that the Georgia statute could not stand. The District Court further declined to sustain the contention of the appellants that the questioned sections of the Georgia statute implemented the Federal Act and regulations and that the Georgia statute was a valid exercise of the police power of the State (R. 162).

SUMMARY OF ARGUMENT.

A. The State of Georgia has the authority to identify tobacco as to type at the time of sale. The Georgia Act substantially adopts the Federal definition of Type 14 tobacco grown in the States of Georgia, Florida and Alaplace, Type 14 tobacco is recognized by the industry and by the United States Department of Agriculture as that tobacco grown in the State of Georgia, Florida and Alabama. Neither the industry nor the United States Department of Agriculture will recognize tobacco grown in any State other than the three named to be Type 14 and be true to type.

The sale of tobacco at auction involves interstate commerce. The tobacco industry is an industry of tremendous economic importance to the State of Georgia and its people and the State may take action in the valid exercise of its police power to protect the industry and the interest of the people in the industry.

The enactment by the Congress of the Federal Tobacco Inspection Act is not such action by the Congress to preclude or pre-empt action by the State of Georgia in identifying tobacco where the State action is not in conflict with the Federal action. The identification of tobacco as to type at the time of sale by the State of Georgia is not in conflict with the Federal Act.

Applying the principle that where an Act is susceptible to two constructions, one of which will uphold the Act in question, it has not been shown that the Georgia Act is in conflict with the Federal Act. The cases in this Court hold that there must be an actual conflict between the State action and the Federal action so as to void the State action. The Federal Tobacco Inspection Act, by its language, provides for cooperation between Federal and State agencies.

The Georgia Act in question does not attempt to provide any new or different type of classification or grading provisions. It seeks merely to provide a positive means of identification of tobacco at the time of sale so as to enable all persons having an interest therein to determine the true type of the tobacco.

The actual operation of the Act precludes the perpetration of a fraud upon purchasers in that it requires the true identity to be made known.

B. Appellees, complainants below, do not have standing to raise the constitutional question here presented because they have not shown an injury, danger, damage, or the invasion of a right such as to give them the requisite standing to raise the constitutional question. The record here showed that the damage complained of is not a direct result of the operation of the Act but is the result of the action of others. The complainants below place their standing solely upon their damage, that damage resulting from the action of others than the State of Georgia and not as a direct and natural consequence of the Act itself, which removes the standing to raise the constitutional question. The complainants have not shown themselves to have the proper standing to raise the constitutional question.

ARGUMENT.

While four questions are presented, three of those questions (1, 2 and 3) can be discussed under one division of this brief. Those questions essentially deal with two broad subdivisions:

(1) The power of the State to regulate activities of the tobacco auction which are essentially local in character and which are relative to an industry, the economic impact of which is of considerable import to the State; and

(2) Whether or not the effort to so regulate can be exercised in the manner attempted here. Embraced in this portion of the question are:

(a) Has the Federal Government so preempted the field as to preclude any State action, and

(b) If the Federal Government has not so preempted the field, is the State action in such conflict with the Federal action as to render it an illegal regulation on the part of the State?

The second broad question presented is the question of the standing of the complainants in this case to raise the constitutional issue. This question is raised only if the position of the appellants here (defendants below) under the first division is untenable.

A. Power of the State to identify tobacco as to type. It is conceded that, under decisions of this Court, the sale of tobacco at auction involves interstate commerce. **Currin v. Wallace,** 306 U. S. 1, 83 L. ed. 441, 59 S. Ct. 379. Involving as it does interstate commerce, the question is presented: Does the action of the State in this instance impose such an onerous burden as to make it unconstitutional exercise of State power? The lower court held, as one of the reasons for striking down the statute, that the

Act here involved was an onerous burden and thus must fail. The record in the case, the findings of the General Assembly of Georgia, and a previous decision of this Court (**Townsend v. Yoemans**, 301 U. S. 441, 81 L. ed. 1210, 57 S. Ct. 842), affirmatively demonstrate that the tobacco industry is an industry of tremendous economic importance to the State and to its people. This being true, it is our contention that the State may take action in the valid exercise of its police power to protect it and its people's interest in this field. In **City Service v. Peerless**, 340 U. S. 179, 95 L. ed. 190, this Court said:

> "The commerce clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated not exclusive . . . It is now well settled that a State may regulate matters of local concern over which Federal authority has not been exercised, even though the regulation has some impact on interstate commerce . . . The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, **that it safeguard an obvious State interest**, and that the local interest at stake outweigh whatever national interest there might be in the prevention of State restrictions."

In Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501, this Court said:

> "The police power in its broadest sense, includes all legislation and almost every function of civil government (Citing cases). It is not subject to definite limitations, but is coexistent with the necessities of the case and the safeguards of public interest . . . It embraces regulations designed to promote public convenience or the general prosperity or wel-

> fare, as well as those specifically intended to promote the public safety or the public health."

That case involved the same principles presented in this case. A statute of the State of Florida undertook to make it unlawful for anyone to sell or offer for sale citrus fruits which are immature or otherwise unfit for consumption. The constitutionality of that Act was challenged insofar as it applied to interstate commerce. This Court rejected the contention that the Act was beyond the police powers of the State of Florida since it did not seek to protect the health of persons within the State of Florida. In rejecting it, this Court said:

> "The limitations upon the police power are hard to define, and its far reaching scope has been recognized in many decisions of this Court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State."

Then, taking judicial notice that the citrus industry is one of the great industries of the State of Florida, this Court held that it was competent for the legislature of the State of Florida to find that it was essential for the success of that industry, that its reputation be preserved in other States wherein such fruits might find their most extensive market:

> "The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose . . .

> "Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . ."

The Georgia Act seeks to do just that. The record affirmatively demonstrates that Type 14 tobacco is that type as universally understood in its marketing to be only tobacco grown in Georgia, Florida and Alabama (testimony of Ben J. Narz, R. 114; Stipulation No. 4, R. 27).

In **Bayside Fish Flour Company v. Gentry**, 297 U. S. 422, 80 L. ed. 772, this Court upheld provisions of the California Fishing and Game Code, alleged to contravene the commerce clause, and due process and equal protection of the Federal Constitution, which regulated the packing and use of sardines caught beyond a three-mile limit off the coast of California. Even though the Act had some impact on interstate commerce, the Court pointed out that its direct operation, intended and actual, was wholly local. In the instant case, the identification provisions of the Georgia Act are in fact wholly local. The identification is required only on sales made within this State, on markets of this State, and is required to remain only so long as it remains in this State. The Act does not prohibit the free flow in commerce of tobacco from other States, but only subjects them to identification when they come within this State for the purpose of being traded on the markets of this State, and are actually placed on such markets for sale. The identification itself is not a burden. It may well be that the purchasers who seek a particular product and who are accurately apprised of the product which they are purchasing might, because of economic factors, pay less for Type 12 or 13, or other types of tobacco than for Type 14 tobacco, but the activities of the State of Georgia are designed to, and in fact do, merely identify the

product. In **Milk Control Board of Pennsylvania v. Eisenberg Farm Products**, 306 U. S. 346, 83 L. ed. 752, this Court upheld a Milk Control Act of the State of Pennsylvania even though it had an effect on interstate commerce, and in so doing, observed:

> "One of the commonest forms of State action is the exercise of police power directed to the control of local conditions and exerted in the interest of the welfare of the State's citizens. Every State's police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the granting of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

Of course there are those cases which have stricken down State statutes purportedly enacted in the exercise of police power which affected interstate commerce, some of which were relied on by the court below, such as **Lempke v. Farmers Grain Company**, 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244, and **Shafer v. Farmers Grain Company**, 268 U. S. 189, 45 S. Ct. 481, 69 L. ed. 909. North Dakota statutes attempted an elaborate price-fixing scheme on wheat grain in North Dakota, ninety per cent of which was shipped to Minnesota, and such was overthrown by this Court. But a reading of those statutes and of those cases demonstrates that the initial action of the State itself resulted in interstate impact and its effect was carried beyond the borders of the enacting State.

Here the State of Georgia seeks to do one thing and one thing alone, advise the purchasers of a given product of the proper identification of that product. Having done that, the State of Georgia retires from the field. Any subsequent effect stems entirely from the actions of the buyers of the product in their exercise of their free right to pay a price based upon their desire, or lack of desire,

for the particular article. It seems to us that it is not a valid argument that because Type 14 tobacco commands a better price than other types, the mere action of the State in properly identifying the tobacco is the cause of that price differential. To so conclude runs counter to universal human knowledge and economic experience dictated by the law of supply and demand. The price differential, if any, results from the activity of the individual purchaser and the only participation of the State has been merely to advise that purchaser of the identity of the product he is purchasing.

In **Plymouth Coal Company v. Pennsylvania**, 232 U. S. 531, 58 L. ed. 712, this Court said:

> "It is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the court to adopt that construction which will uphold its validity, there being a strong presumption that the lawmaking body has intended to act within, and not in excess of, its constitutional authority."

The opinion below demonstrates a rejection of this principle by the lower court, indeed a reversal of the principle, for the Court states without comment or elaboration, that:

> "The Georgia statute imposes upon the producers of tobacco in other States who bring their products into that State for sale onerous burdens which it does not impose upon Georgia growers."

What is that burden? The duty to identify? The same burden is imposed upon the Georgia grower. The only result is that one product, whose origin is not confined to Georgia alone, but also includes Florida and Alabama, is more desired in the market place.

It seems to us, therefore, that it cannot be questioned that the State of Georgia under the decided cases of this Court has a right under its police power to impose the regulation hereunder attacked, despite the interstate commerce clause.

We recognize that if Congress has pre-empted the field in which Georgia attempts to act, this Act must fall. As stated in **Southern Pacific Co. v. Arizona**, 325 U. S. 761, 89 L. ed. 1915, 65 St. Ct. 1515, the Supreme Court of the United States had this to say:

> "Congress in enacting legislation within its constitutional authority over interstate commerce will not be deemed to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

Or we turn to **Rice v. Santa Fe Elevator Corp.**, 331 U. S. 218, 91 L. ed. 1447, 67 S. Ct. 1146, where in speaking for the Court on the subject of pre-emption, by the Federal government, so as to exclude legislation by States, Justice Stone wrote, beginning on page 230:

> "The question in each case is what the purpose of Congress was. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it, . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system

> will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose . . . Or the state policy may produce a result inconsistent with the objective of the federal statute."

In order for this Act to be stricken, those attacking it must demonstrate first that there is a clear preemption and intention to preempt, and secondly, if the statute is capable of two interpretations, then that interpretation which would uphold its validity should be given.

Is there such a clear preemption as to preclude the State from acting? Examining the Federal Act, do we find any expression of Congress that would support a theory of exclusive occupation of the field? No. However, we find several sections which do support the theory that Congress did not intend to completely occupy the field.

Section 6 of the Federal Act begins with these words:

> "That the Secretary, independently or in cooperation with other branches of the Government, State agencies, or persons, . . ."

Does this sound as though Congress intended that only Federal agencies should be allowed to act here? A similar question arose concerning the Federal Commodity Exchange Act, and the Supreme Court, in ruling that the Act did not preempt so as to deprive States of regulation in the field, stated in **Rice et al. v. Chicago Board of Trade,** 331 U. S. 247, 91 L. Ed. 1468, 67 S. Ct. 1160, at page 255:

> "Moreover the provision in § 12 of the Act that the Secretary 'may cooperate with any department or agency of the Government, and State . . . or

political subdivision thereof' supports the inference that Congress did not design a regulatory system which excluded state regulation not in conflict with the federal requirements. . . ."

The lower court concludes that Congress preempted the field as the second basis for striking down the Act. In so doing, the court concludes that Section 2 of the Tobacco Inspection Act is clear evidence of Congress' intention to preempt the field. That Section states that:

"Without uniform standards of classification and inspection . . . unreasonable fluctuations in prices and quality determinations occur . . . such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative . . ."

The Act further authorizes the Secretary to establish standards by type, grade, size, etc. Is this language and this power such a clear demonstration of Congress' intention to preempt the field as to authorize the Federal Courts to exercise their power to strike down the Georgia Act? This Court has many times said that the exercise of this power should be cautiously used in order to maintain the delicate balance of our Federal system. **Mathews v. Rodgers**, 284 U. S. 521, 76 L. Ed. 447. The Georgia Act does not attempt to type, does not attempt to establish, a classification. It merely seeks to identify. Its identification provision virtually adopts the Federal definition. The Georgia definition of Type 14 tobacco is identical to the Federal definition save for a few words. The Federal definition is:

"That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia, and to some extent in Florida and Alabama." (7 C. F. R., § 29.1100.)

The Georgia definition is:

> "Type of flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida, and Alabama." (Georgia Laws, 1960, pp. 214-227, inclusive, at page 216.)

The common understanding in the marketplace (testimony of Ben J. Narz, R. 114), the official Federal publication (Defendant's Exhibit 1—map), and the Stipulation of the Parties (Stipulation No. 4, R. 27), is that the Georgia definition is in fact the one practically in force under the Federal Act. In this case, there is no evidence, there is no contention, that the Georgia definition in application, and in fact, causes a typing of a person's tobacco contrary to what its type would be under the Federal definition. The lower court summarizes that there exists the possibility that under Georgia's definition, some person's tobacco **may** be typed differently from what it would be under the Federal Act. But no such person is before this Court. No evidence is here from which it can be fairly concluded that tobacco, which under the Federal Regulation would be Type 14, is in fact precluded from having that type indicated under the Georgia Act. Indeed the record demonstrates that the actual state of facts demands the contrary conclusion. Perhaps a person who, under Federal Regulation, was possessed of Type 14 tobacco, and who would be precluded from receiving on the Georgia markets an identification as Type 14 under the Georgia Act, if such were possible, could assail this statute as discriminatory, but until such a person appears, and until it is shown by other than speculation and conjecture, that such a person exists, the police power of the State and the validity of its statute should be upheld.

The decided cases of this Court demonstrate that statutes of a State which dealt with a subject matter and a

field in which Congress has acted, will not be stricken down merely because Congress has acted; but such cases call "for the application of the well established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal regulation is not to be implied unless the latter, fairly interpreted, is in actual conflict with the State law." In **City Service v. Peerless**, 340 U. S. 179, 95 L. Ed. 190, an order of a State Commission fixing the well-head price of natural gas produced within its borders, and sold in-State, was upheld despite the broad power of the Federal Natural Gas Act and the Federal Power Commission given pursuant thereto.

In **Turner v. Maryland**, 107 U. S. 38, 27 L. Ed. 370, this Court upheld the right of the State of Maryland to inspect and identify tobacco shipped from that State in interstate commerce despite Federal action in that field. In **Detwiler v. Welsh**, 46 F. 2d 71, the Circuit Court of Appeals for the Ninth Circuit upheld an Act of the State of Idaho calling for the classification of potatoes shipped from that State in interstate commerce even though Federal classification was also in existence. In **Pacific States Box Company v. White**, 296 U. S. 176, 80 L. Ed. 138, a State regulation prescribing the use of certain types of containers in marketing berries, which went in interstate commerce, was permitted even though Congress had a Federal Standard Baskets and Containers Act. This Court there pointedly remarked:

> "When such legislative action is called in question, if any state of facts reasonably can be conceived that could sustain it, there is a presumption of the existence of that state of facts and one who assails the classification must carry the burden by resorting to common knowledge or other matters which may be

judicially noticed or to other proof that the action is arbitrary."

In **Townsend v. Yeomans**, 301 U. S. 441, 81 L. ed. 1210, 57 S. Ct. 842, under the Georgia Act in question, the Secretary of Agriculture was given jurisdiction over markets; the State legislation regulating those markets was upheld by this Court.

In **Corn Products Refining Co. v. Eddy**, 249 U. S. 427, 63 L. ed. 689, 39 S. Ct. 325, the State of Kansas had adopted a law requiring all syrups sold in the State to show the percentage of each ingredient contained therein. The statute was attacked as a burden on interstate commerce and also on the grounds that the area was covered by the Federal Pure Food Act so that the field was preempted. The Supreme Court rejected these contentions citing **Savage v. Jones**, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715, which was a dispute over an Indiana labeling Act for commercial feeding stuffs for animals. That Act was upheld as good against an attack on grounds of burdening interstate commerce and preemption by the Federal Food and Drug Acts. The Court, in its opinion:

"For when the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished . . . if the operation within its chosen field else must be frustrated and its provisions be refused their natural effect . . . the state law must yield to the regulation of Congress within the sphere of its delegated power. . . . **But** the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from mere fact that Con-

gress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has abundant illustration . . . The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal Act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of State to Federal authority."

This Court, in **Huron Portland Cement Co. v. Detroit**, 362 U. S. 440, 4 L. ed. 2d 852, 80 S. Ct. 813, dealt with the authority of a State to act concurrently with the Federal Government. At pages 442-445, the Court said:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. Gibbons v. Ogden (U. S.), 9 Wheat. 1, 6 L. ed. 23; Cooley v. Board of Wardens (U. S.), 12 How. 299, 13 L. ed. 996; The New York v. Rea (U. S.), 18 How. 223, 15 L. ed. 359; Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L. R. A. N. S. 1151, Ann. Cas. 1916A 18; Wilmington Transp. Co. v. Railroad Com., 236 U. S. 151, 59 L. ed. 508, 35

S. Ct. 276; Vandalia R. Co. v. Public Service Com., 242 U. S. 255, 61 L. ed. 276, 37 S. Ct. 93; James Stewart & Co. v. Rivara, 274 U. S. 614, 71 L. ed. 1234, 37 S. Ct. 718; H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 83 L. ed. 500, 59 S. Ct. 438.

"The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action, Erie R. Co. v. New York, 233 U. S. 671, 58 L. ed. 1149, 34 S. Ct. 756, 52 L. R. A. N. S. 266, Ann. Cas. 1915D 138; Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 70 L. ed. 482, 46 S. Ct. 279; Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 71 L. ed. 432, 47 S. Ct. 207; Missouri P. R. Co. v. Porter, 273 U. S. 341, 71 L. ed. 672, 47 S. Ct. 383; Service Storage & Transfer Co. v. Virginia, 359 U. S. 171, 3 L. ed. 2d 717, 79 S. Ct. 714, or unduly burdensome on maritime activities or interstate commerce, Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Morgan v. Virginia, 328 U. S. 373, 90 L. ed. 1317, 66 S. Ct. 1050, 165 A. L. R. 574; Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962.

"In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1195, 32 S. Ct. 715. See also Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92; Asbell v. Kansas,

209 U. S. 251, 52 L. ed. 778, 28 S. Ct. 485, 14 Ann. Cas. 1101; H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 83 L. ed. 500, 59 S. Ct. 438; Maurer v. Hamilton, 309 U. S. 598, 84 L. ed. 969, 60 S. Ct. 726, 135 A. L. R. 1347.

"In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 S. Ct. 95; Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L. R. A. N. S. 1151, Ann. Cas. 1916A 18; Boston & M. R. Co. v. Armburg, 285 U. S. 234, 76 L. ed. 729, 52 S. Ct. 336; Collins v. American Buslines, Inc., 350 U. S. 528, 100 L. ed. 672, 76 S. Ct. 582. But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Southern P. Co. v. Arizona, 325 U. S. 761, 89 L. ed. 1915, 65 S. Ct. 1515; Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962.

"Although verbal generalizations do not of their own motion decide concrete cases, it is nevertheless within the framework of these basic principles that the issues in the present case must be determined."

The dissenting opinion by Mr. Justice Douglas, Mr. Justice Frankfurter concurring, stated, at page 449:

> "Nor is this the rare case where state law adopts the standards and requirements of federal law and is allowed to exact a permit in addition to the one demanded by federal law. California v. Zook, 336 U. S. 725, 735, 93 L. Ed. 1005, 1012, 69 S. Ct. 841."

Further examining the Federal Tobacco Inspection Act, we find under Section 10:

> "It shall be unlawful . . . (c) for any person not an authorized inspector under this chapter, to issue a certificate or report stating the type, grade, or size or condition of any lot of tobacco to be in accordance with the standards of the United States therefor which is of such color, size, arrangement, or wording as to be mistaken for a certificate issued under this chapter, unless such certificate states in prominent letters in its heading that it is not issued under authority of the United States."

These certainly are not the words that exclude **any** action by any other persons or the State. Rather than exclude any certificate or tags, the statute makes it unlawful to issue one which purports to be a United States certificate or tag. The obvious implication is that the Act does not exclude other tickets disclosing the same information as to type, etc., if it is not of such appearance as to be that of a United States ticket.

Still further litigation has been decided which was directly concerned with the placing of tickets on tobacco for sale. **Lazar v. Benson,** 156 F. Supp. 259, held that United States Department of Agriculture regulations requiring warehousemen to use tickets to identify tobacco certified as from farms producing desirable varieties of

tobacco, so as to distinguish tobacco from undesirable varieties, were authorized under the Federal Act in order to prevent loss of tobacco export markets. In this situation, distinguishably different tickets were used.

Also in 1957, **Stroud v. Benson**, 155 F. Supp. 482, reversed on other grounds, 254 F. 2d 448, it was held that the Federal Tobacco Inspection Act which provided that tobacco warehousemen shall provide a place on warehouse ticket or label for the grade as determined by an authorized tobacco inspector, does not prohibit the disclosure of additional information on such warehouse tickets, and **striped tickets** to show tobacco as discount varieties does not violate the Federal Act.

A comparison of the definitions of Type 14 tobacco in the Georgia Act and the definition of Type 14 tobacco under the Federal Act is revealing:

> "Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida, and Alabama." (Georgia Laws, 1960, pages 214-227, inclusive, at page 216; Ga. Code Ann., Ch. 111-2.)
>
> "That type of flue-cured tobacco commonly known as Southern flue-cured or New Belt, of Georgia, Florida and Alabama, produced principally in the Southern section of Georgia, and to some extent in Florida and Alabama" (7 C. F. R., § 29.1100).

A mere reading shows an attempt on the part of Georgia to adopt the Federal definition and upon that premise require identification as to type. The differences in the definitions are negligible and of no consequence. Close examination discloses that the Georgia Act has simply adopted the Federal definition, with some minor changes in terminology, and is completely consistent with Section

3 of the Federal Act which directs that the Secretary is authorized to establish standards by which its type, grade, size, etc., may be determined, which standards shall be the official standards of the United States. Georgia has not attempted to set up a new definition, or standard, but adheres to that already defined and in common use by and in the United States.

The Federal Tobacco Inspection Act was enacted by the Congress to provide uniform standards of classification and inspection that the Congress determined to be imperative for the protection of producers and others engaged in commerce and the public interest in tobacco transactions, 7 U. S. C. A., § 511a. This was a recognition of the uncertainty in prices received by the growers of tobacco based upon the variation in grading methods utilized in the marketing of tobacco.

The Federal Act (Section 8, 7 U. S. C. A., 5119) imposes a duty upon warehousemen to provide space on warehouse tickets, tags or labels used by them for showing the grade of the lot of tobacco covered, as determined by an authorized tobacco inspection. After imposing the duty, the Secretary is authorized to prescribe the form in which the certification of grade is to be shown and further authorized to require a copy to be furnished to the Secretary. A mere reading of this requirement shows that the Congress stressed and placed great importance upon showing the grade of tobacco. No requirement as to labeling or tagging to show type is found in this section nor is there any requirement in the Act that type be shown on the label. This is emphasized by the language used in Section 10 (a), 7 U. S. C. A. 511 (1), which makes it unlawful to use the words "United States," "Government," or "Federal" in connection with or statement relating to the grades of tobacco when in fact the grade is not one of the grades of tobacco according to the standards of the United States.

B. Do complainants have standing to raise constitutional question? In the opinion below, the Court states that the Intervenor raised the question of whether these complainants may raise this constitutional issue. At the outset, let us state that this question is raised by both the State, the original defendant, and the Intervenor, by virtue of their motion to dismiss. This portion of the question was discussed in the brief of the Intervenor filed in the court below merely because of the division of questions in the preparation of the brief. Each of the appellants here raise this question and not merely the Intervenor alone.

We have previously pointed out that there is no one before this Court nor is there any evidence before this Court except by conjecture that anyone exists who is prevented from marketing tobacco classified under Federal Regulations as Type 14 in the State of Georgia by virtue of the Georgia Act.

The trend of the Federal Courts is to avoid, wherever possible, the destruction of State statutes upon the complaint of persons merely because they are affected in some regard by that statute. This is particularly true of Federal Equity Court and in situations where jurisdiction, as here, is entirely dependent upon 28 U. S. C. A. 1331. In **Matthews v. Rodgers**, 284 U. S. 521, 76 L. ed. 447, wherein Justice Stone said:

> "The scrupulous regard for the rightful independence of state governments, which should at all times actuate the Federal Courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it."

In the instant case, the State statute in question provided a right and a remedy administratively and within the State court for these complainants. They did not avail themselves of those rights and the Federal question now relied on was and would be preserved in such proceedings. In the case at bar, the effect of the statute complained of upon these complainants is indirect. The alleged effect of this Act is directed toward growers of other than Type 14 tobacco, none of whom are parties to this controversy. While it is true, as shown by the complainants and by the evidence, that an adverse financial result will affect the complainants, that effect is not only indirect, it is speculative and must result, not from the Act of the State of Georgia, but from the acts of others. These complainants must show, as they have not shown, that the natural result of the enforcement of this Act, in and of itself, precludes the introduction into commerce of tobacco grown in North Carolina and South Carolina. The Act itself does not preclude commerce, nor does it place an artificial barrier upon that commerce. It requires only that after coming to rest upon the warehouse floor in Georgia for the purpose of being marketed, that it be identified as to its type, which is understood to connote its place of origin. Before these complainants can be heard, to such a degree as to give them a standing to raise this question, they must show that the natural result is to prevent these shipments from coming into the State, and as has been shown, that result will come about only if and so long as the buyers of tobacco do not pay as much for that tobacco as they would pay for the same tobacco in markets elsewhere. In the case of Excello Corp. v. City of Chicago, 115 F. 2d 627, the Seventh Circuit Court of Appeals denied the right of a manufacturer of patented machines for the production of paper milk bottles to raise the constitutional question as to whether an ordinance of the City of Chicago prohibiting the use of

paper milk containers, was valid. The Court recognized that while that plaintiff, a non resident of the State of Illinois, would be adversely affected financially, it held that that result was "incidental, inconsequential and indirect." At page 629, the Court said:

> "Thus it is apparent that inevitable financial pecuniary damage is not the test of the sufficiency of plaintiff's interest, otherwise the right to sue might be extended indefinitely to parties far removed, such as workmen in plaintiff's factory whose wages are reduced or lost because of lack of realization of profits by their employer."

The Court said (Divisions 2 and 3):

> "This power of judicial determination (the power to declare unconstitutional) is delicate in character, one to be exercised with caution and care, and it may result in disapproval of Acts of the Legislative Department or of actions of the Executive Department, both coordinate branches of the government."

In **L'Hote v. City of New Orleans**, 177 U. S. 587, 44 L. Ed. 899, the Supreme Court of the United States refused to permit the owner of property to challenge the constitutionality of an ordinance of that city declaring that prostitutes would occupy houses only in a certain area, even though the plaintiff owned land in that area and the alleged result was diminution of the value of that land. Our Fifth Circuit Court of Appeals, with Chief Judge Joseph Hutcheson participating, in **Sproles v. Binford et al.**, 52 F. 2d 730, refused to permit the manufacturer of a motor vehicle to test the validity of a Texas statute governing the size of motor vehicles on its highways, even though its business would be wrecked by the enforcement of the Act.

In **Savage v. Jones**, 225 U. S. 501, 56 L. Ed. 1183, the Supreme Court did permit a Minnesota manufacturer of a stock feed to test the validity of an Indiana statute requiring him, the manufacturer, to place upon his original packages, a statement of its contents. There, however, the statute required some action in the foreign state by the manufacturer himself. Here, the statute requires action only of the local warehouseman within the state passing the Act.

In **Wallace v. Currin**, 95 F. 2d 856, affirmed by the Supreme Court in **Currin v. Wallace**, 306 U. S. 1, the Fourth Circuit Court of Appeals did permit tobacco warehousemen to test the validity of the Federal Tobacco Inspection Act. Significantly, however, they did not do so, based upon allegations which appear in this petition, as to loss of commerce but laid it on the basis that the complainant had the right to operate his business without complying with it and said that he should not be required to abandon what he thought was right. In the case at bar, the plaintiffs never contended that they thought the Act was wrong and were not standing upon such high judicial ground, but rather their complaint did have standing solely upon their damage, which damage would result only from the action of others and not as a direct and natural consequence of the Act itself.

The cases refusing to a plaintiff the standing to test the validity of an Act are collected in the **Excello** case, supra. In **Mass. v. Mellon**, 262 U. S. 447, 67 L. Ed. 1078, the Supreme Court of the United States announces the rule as follows:

> "The party who invokes the power must be able to show not only that the Statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its en-

forcement, and not merely that he suffers in some indefinite way in common with the people generally."

As to whether plaintiffs below have standing to raise a constitutional question, in **Federation of Labor v. McAdory**, 325 U. S. 450, 89 L. ed. 1725, 65 S. Ct. 1384, this Court has stated very briefly the principle under which such question must be answered. The Court said on page 467:

> "We can be asked to condemn a state statute as in conflict with national legislation only if the conflict is clearly shown, . . . and only by those who show that they are adversely affected by the conflict with national power."

And in **Premier-Pabst Sales Co. v. Grosscup et al.**, 298 U. S. 226, 80 L. ed. 1155, 56 S. Ct. 754, the Court, citing **Heald v. District of Columbia**, 259 U. S. 114,

> "One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him."

The complaint below showed that the appellees were operating warehouses on two of the twenty-three tobacco markets in Georgia, that the Act itself required of appellees exactly what was required of all twenty-three markets. The evidence showed that at least five of the twenty-three markets, including the two in which appellees operate, were affected in practical operation exactly as were complainants. The evidence demonstrated and the conclusion was demanded that any injury to the complainants resulted not from the Act alone but from the Act in conjunction with the mental attitude of producers and the purchasing action of buyers.

Complainants below sought to show injury through loss of business, or plainly speaking, through loss of sales with

a resultant loss of commissions, a pecuniary injury. It is the contention of the appellants that this is not such injury as to confer standing to complainants below to challenge the constitutionality of the Georgia Act. It was the finding of the court below that:

> ". . . compliance with these provisions has resulted in financial losses to the plaintiffs as well as to the growers from other states who desired to market their tobacco at the plaintiffs' warehouses. This being so, the plaintiffs may bring and maintain the action."

This would seem to be in conflict with the holding of **Excello Corp. v. City of Chicago**, supra, which held that financial pecuniary damage is not the test of the sufficiency of plaintiff's interest. In **Benson et al. v. Schofield et al.**, 236 F. 2d 719, 98 U. S. App. D. C. 424, certiorari denied, 352 U. S. 976, 1 L. ed. 2d 324, 77 S. Ct. 363, the Court ruling upon pecuniary damage as a basis of conferring standing:

> "Mere loss of income in consequence of action of governmental or economic disadvantage, by itself, constitutes damnum absque injuria which does not confer standing."

In a case which challenged the Federal Tobacco Inspection Act, **Wallace v. Currin**, 95 F. 2d 856, the Court, while later sustaining on other grounds the right of the plaintiff there to bring the suit, had this to say concerning plaintiffs' contention that they as warehousemen had standing to question the constitutionality of that Act because of loss of profits:

> "Coming to the first question presented by the appeal, i. e. the standing of complainants to maintain the suit, it is difficult to see that they have sustained, or can sustain, any substantial damage as a result of the enforcement of the act. The matter of difference

> in prices on which they rely has little probative value, as it may have been due to a variety of circumstances; and we do not see how correct grading can result in otherwise than in better prices for the growers and consequently in increased commissions for the warehousemen."

As a further basis for sustaining the appellees' standing to challenge the statute, the court below said:

> "The provisions which the plaintiffs assail directly bear upon them in the operation of their businesses. It is upon them that the act imposes the duty of placing the tags, white or colored, upon tobacco."

Plaintiffs had complied with the Act in every way since its enactment, and had procured tags and attached them to the sheets of tobacco for two sale days before bringing the action below. It is submitted that their sole basis for bringing the action was pecuniary loss, and not because of any oppressive duty imposed upon them in complying with the Act. § 29.77 of Regulations of the Secretary of Agriculture under the Tobacco Inspection Act of August 23, 1935, Amended Regulations July 31, 1959, provides:

> "A mandatory inspection ticket, . . . shall be provided by each auction warehouseman on a designated market to cover each lot of tobacco offered for sale at auction by him on such market."

It has been neither alleged or contended that such federally imposed duty has been detrimental to complainant's below. Why, then, should a similar tagging requirement be oppressive when imposed by the State?

We respectfully contend that even though some financial damage might have accrued to the complainants in this case, as an **indirect result** of the enforcement of this

Act, that any damage was just that—indirect, inconsequential, incidental. If these complainants have standing in this case, so do motel operators, so do bankers who clear the checks, so do filling station operators and restaurants, and, as in the **Excello** case, supra, so do laborers in the warehouse. Applying the zealous recognition in **Mathews v. Rodgers**, supra, for the protection of the independence of the states by the Federal Courts, noting the continued existence and preservation of the federal question within the framework of the State Courts, we are driven to the conclusion that the Court of Equity below should have denied the relief sought.

At the outset in the court below the parties entered into a stipulation (Stipulation No. 4, R. 27), which, as we have previously suggested, showed that the Georgia Act was in its practical application a proper adoption of the Federal Regulation as to type. Additionally, that stipulation shows that these complainants have no standing in this Court. While it is true that the lower court held that a stipulation could not fix or change the law (R. 157), the Court observed that parties:

> ". . . may waive the benefit of constitutional or statutory provisions."

The sole basis of the basis of the decision below that the Georgia Act was unconstitutional is primarily planted on the lower court's determination that there is a conflict between the Georgia Act and the Federal definition, and that since there "**may**" be persons who would be illegally precluded from marketing their Type 14 tobacco under a white tag on Georgia markets, the Act must be stricken down. This stipulation, though, shows that none of those people are before this Court and that these complainants are not included in those "possible" persons, nor are any of their customers upon which they base their standing in this Court, included among those "possible" persons.

As a last authority on the questions herein presented, appellants would like to respectfully refer the Court to the recent case of **United States v. Raines**, 362 U. S. 17, 4 L. ed. 2d 524, 80 S. Ct. 519, a portion of the opinion of which is considered very pertinent to the questions here. At page 20:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison (U. S.), 1 Cranch. 137, 177-180, 2 L. ed. 2d 60, 73, 74. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration, 113 U. S. 33, 39, 28 L. ed. 899, 901, 5 S. Ct. 352. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional (citing numerous cases). . . . In Barrows v. Jackson, 346 U. S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the

incontrovertible proposition that it 'would, indeed, be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' Id. 346 U. S. at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. . . ."

It is respectfully submitted that the appellees (complainants below) are not in a position to raise the constitutional questions.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed and the injunction dissolved.

Respectfully submitted,

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EXHIBIT A.

The Tobacco Inspection Act.

[Public—No. 314—74th Congress].

[H. R. 8026].

AN ACT

To establish and promote the use of standards of classification for tobacco, to provide and maintain an official tobacco inspection service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when used in this Act—

(a) "Person" includes partnerships, associations, and corporations, as well as individuals.

(b) "Secretary" means the Secretary of Agriculture of the United States.

(c) "Inspector" means any person employed, licensed, or authorized by the Secretary to determine and certify the type, grade, condition, or other characteristics of tobacco.

(d) "Sampler" means any person employed, licensed, or authorized by the Secretary to select, tag, and seal official samples of tobacco.

(e) "Weigher" means any person employed, licensed, or authorized by the Secretary to weigh and certify the weight of tobacco.

(f) "Tobacco" means tobacco in its unmanufactured form.

(g) "Auction market" means a market or place to which tobacco is delivered by the producers thereof, or their agents, for sale at auction through a warehouseman or commission merchant.

(h) Words in the singular form shall be deemed to import the plural form when necessary.

(i) "Commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purposes of this Act (but not in any wise limiting the foregoing definition) a transaction in respect to tobacco shall be considered to be in commerce if such tobacco is part of that current of commerce usual in the tobacco industry whereby tobacco or products manufactured therefrom are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Tobacco normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possessions of the United States, and foreign nations.

Sec. 2. That transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; that such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; that the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; that without uni-

form standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; that such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein.

Sec. 3. That the Secretary is authorized to investigate the sorting, handling, conditioning, inspection, and marketing of tobacco from time to time, and to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States, and shall become effective immediately or upon a date specified by the Secretary: Provided, That the Secretary may issue tentative standards for tobacco prior to the establishment of official standards therefor, and he may modify any standards established under authority of this Act whenever, in his judgment, such action is advisable.

Sec. 4. That the Secretary is authorized to demonstrate the official standards; to prepare and distribute, upon request, samples, illustrations, or sets thereof; and to make reasonable charges therefor: Provided, That in no event shall charges be in excess of the cost of said samples, illustrations, and services so rendered.

Sec. 5. That the Secretary is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce. Before any market is designated by the Secretary under this section he shall determine by referendum the desire of tobacco grow-

ers who sold tobacco at auction on such market during the preceding marketing season. The Secretary may at his discretion hold one referendum for two or more markets or for all markets in a type area. No market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting favor it. The Secretary shall have access to the tobacco records of the Collector of Internal Revenue and of the several collectors of internal revenue for the purpose of obtaining the names and addresses of growers who sold tobacco on any auction market, and the Secretary shall determine from said records the eligibility of such grower to vote in such referendum, and no grower shall be eligible to vote in more than one referendum. After public notice of not less than thirty days that any auction market has been so designated by the Secretary, no tobacco shall be offered for sale at auction on such market until it shall have been inspected and certified by an authorized representative of the Secretary according to the standards established under this Act, except that the Secretary may temporarily suspend the requirement of inspection and certification at any designated market whenever he finds it impracticable to provide for such inspection and certification because competent inspectors are not obtainable or because the quantity of tobacco available for inspection is insufficient to justify the cost of such service: Provided, That, in the event competent inspectors are not available, or for other reasons, the Secretary is unable to provide for such inspection and certification at all auction markets within a type area, he shall first designate those auction markets where the greatest number of growers may be served with the facilities available to him. No fee or charge shall be imposed or collected for inspection or certification under this section at any designated auction market. Nothing contained in this Act shall be construed to prevent transactions in tobacco at markets not designated by the Secretary

or at designated markets where the Secretary has suspended the requirement of inspection or to authorize the Secretary to close any market.

Sec. 6. That the Secretary, independently or in cooperation with other branches of the Government, State agencies, or persons, whether operating in one or more jurisdictions, is authorized to employ and/or license competent persons as samplers to take official samples of tobacco, or as weighers to weigh and certify the weight of tobacco, or as inspectors of tobacco to determine and certify, upon the request of the owner or other financially interested person, the type, grade, weight, condition, and/or such other facts as the Secretary may deem necessary.

The Secretary is authorized to fix and collect such fees or charges in the administration of this section as he may deem reasonable, and the moneys collected, except as provided in this section, shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts. Fees or charges collected under an agreement with a State, municipality, or person, or by an individual licensed to inspect or weigh or sample tobacco under this Act, may be disposed of in accordance with the terms of such agreement or license. Charges for expenses for travel and subsistence incurred by inspectors or weighers or samplers employed by the Secretary when required to be paid by the applicant for service, may be credited to the appropriation, or any other funds authorized in this Act from which they were paid.

This section is intended merely to provide for the furnishing of services upon request of the owner or other person financially interested in tobacco to be sampled, inspected, or weighed and shall not be construed otherwise.

Sec. 7. That the Secretary shall provide for such reinspection or appeal inspection of tobacco as he may deem

necessary for the confirmation or reversal of certificates issued under this Act. Each inspection certificate issued under this Act, unless invalidated or superseded in accordance with the regulations of the Secretary, shall be received in all courts and by all officers and employees of the United States as prima facie evidence of the truth of the statements therein contained.

Sec. 8. That warehousemen shall provide space on warehouse tickets or other tags or labels used by them for showing the grade of the lot covered thereby as determined by an authorized tobacco inspector under this Act. The Secretary may prescribe, by regulation, the form in which such certification of grade shall be shown, and may require that a copy of such warehouse ticket, tag, or label shall be furnished to the Secretary.

Sec. 9. That the Secretary is authorized to collect, publish, and distribute, by telegraph, mail, or otherwise without cost to the grower, timely information on the market supply and demand, location, disposition, quality, condition, and market prices for tobacco.

Sec. 10. It shall be unlawful—

(a) For any person to use the words "United States", "Government", or "Federal", or any abbreviation thereof, in, or in connection with, any statement relating to the grade of tobacco when such grade is not, in fact, one of the grades for tobacco according to the standards of the United States.

(b) For any person falsely to make, issue, alter, forge, or counterfeit, or aid, cause, procure, or assist in or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate, stamp, tag, seal, label, or other writing purporting to be issued or authorized under this Act.

(c) For any person, not an authorized inspector under this Act, to issue a certificate or report stating the type, grade, size, or condition of any lot of tobacco to be in accordance with the standards of the United States therefor which is of such color, size, arrangement, or wording as to be mistaken for a certificate issued under this Act, unless such certificate states in prominent letters in its heading that it is not issued under authority of the United States.

(d) For any person employed, designated, or licensed by the Secretary as an inspector, sampler, or weigher of tobacco under this Act knowingly to inspect, sample, or weigh improperly, or to issue any false certificate under this Act, or to accept money or other consideration, directly or indirectly, for any neglect or improper performance of duty as an inspector, sampler, or weigher.

(e) For any person improperly to influence or to attempt improperly to influence or forcibly to assault, resist, impede, or interfere with any inspector, sampler, weigher, or other person employed, designated, or licensed by the Secretary in the execution of his duties under this Act: Provided, however, That nothing herein shall operate to prevent the owner of tobacco from appealing or protesting, in accordance with regulations of the Secretary, the grade certified for his tobacco.

(f) For any person falsely to represent or otherwise indicate that he is authorized by the Secretary to inspect, sample, or weigh tobacco under this Act.

(g) For any person to substitute, or attempt to substitute, following inspection or sampling or weighing under this Act, other tobacco for tobacco actually inspected or sampled or weighed, or in the case of tobacco inspected in auction warehouses for any person not so authorized by

the Secretary to remove any certificate of grade from any lot of tobacco prior to the sale of such lot.

(h) For any person falsely to represent that tobacco has been inspected, sampled, or weighed under this Act; or knowingly to have made any false representation concerning tobacco inspected under this Act; or knowing that tobacco is to be offered for inspection or sampling under this Act to load, pack, or arrange such tobacco in such manner as knowingly to conceal foreign matter or tobacco of inferior grade, quality, or condition; or for any person knowing that tobacco has been so loaded, packed, or arranged, to offer it for inspection or sampling without disclosing such knowledge to the inspector or sampler before inspection or sampling.

(i) For any person willfully to alter an official sample of tobacco by removing or plucking leaves or otherwise, or for any person knowing that an official sample of tobacco has been so altered, thereafter to represent such sample as an official sample.

Sec. 11. The Secretary is authorized to publish the facts regarding any violation of this Act.

Sec. 12. That any person violating any provision of sections 5 and 10 of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Sec. 13. In construing and enforcing the provisions of this Act; the act, omission, or failure of any agent, officer, or other person acting for or employed by an association, partnership, corporation, or firm, within the scope of his employment or office, shall be deemed to be the act, omission, or failure of the association, partnership, corporation, or firm, as well as that of the person.

Sec. 14. The Secretary is authorized to make such rules and regulations and hold such hearings as he may deem

necessary to effectuate the purposes of this chapter and may cooperate with any other Department or agency of the Government; any State, territory, district, or possession, or department, agency, or political subdivision thereof; purchasing and consuming organizations, boards of trade, chambers of commerce, or other associations of business men or trade organizations; or any person, whether operating in one or more jurisdictions in carrying on the work herein authorized; and he shall have the power to appoint, suspend, remove, and fix the compensation of all officers, employees, and licensees not in conflict with existing law. The Secretary is authorized to make such expenditures for rent outside of the District of Columbia, printing, binding, telegrams, telephones, books of reference, publications, furniture, stationery, office and laboratory equipment, travel, tobacco for use in preparing and demonstrating standards, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for administering this chapter.

Sec. 15. That in carrying on the work herein authorized, the Secretary, or any officer or employee designated by him for such purpose, shall have power to hold hearings, administer oaths, sign and issue subpenas, examine witnesses, and require the production of books, records, accounts, memoranda, and papers. Upon refusal by any person to appear, testify, or produce books, records, accounts, memoranda, and papers in response to a subpena, the proper United States district court shall have power to compel obedience thereto.

Sec. 16. That if any provision of this Act or the application thereof to any person or circumstance is held invalid,

the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Sec. 17. That any duties devolving upon the Secretary of Agriculture by virtue of the provisions of this Act may with like force and effect be executed by such officer or officers, agent or agents, of the Department of Agriculture as the Secretary may designate for the purpose.

Sec. 18. That this Act may be cited as "The Tobacco Inspection Act."

Approved, August 23, 1935. As amended, October 28, 1949.

EXHIBIT "B".

State of Georgia.

Office of Secretary of State.

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify that the fourteen (14) pages of photographed matter hereto attached contains a true and correct copy of Georgia Laws, 1960, Act No. 557, H. B. 717, approved by the Governor on March 7, 1960; all as the same appears of file and record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 30th day of August, in the year of our Lord One Thousand Nine Hundred and Sixty-one, and of the Independence of the United States of America the One Hundred and Eighty-sixth.

Ben W. Fortson, Jr.,

(Seal) Secretary of State.

AGRICULTURE—REGULATION OF SALES OF FLUE-CURED TOBACCO.

Code Chapter 111-2 Repealed.

No. 557 (House Bill No. 717).

An Act to regulate the sale of flue-cured leaf tobacco in this State so as to enable producers to have an adequate time to properly cure, prepare, and market flue-cured leaf tobacco; to provide a means of identifying all types of flue-cured leaf tobacco sold in this State and a procedure connected therewith, to provide for the licensing and bonding of operators of flue-cured leaf tobacco and a procedure connected therewith and a license fee; to provide for the bonding of operators of tobacco warehouses, the amount thereof, and the conditions of such bond; to provide the maximum charges and expenses of handling and selling leaf tobacco in this State; to provide that statements of charges shall be submitted by the warehouseman to the seller of tobacco; to provide for records to be kept by licensee to show the origin and amount of tobacco sold by him and a procedure connected therewith; to provide for the duties of the Commissioner of Agriculture in compiling statistics relative to the sale of leaf tobacco; to create an advisory board and to provide its composition, the duties of the members thereof and their compensation; to provide for the setting of the opening date of the tobacco marketing season in this State and to provide a procedure connected therewith; to provide a minimum tobacco marketing season in this State and a procedure for the ceasing of operations of a warehouse prior to the expiration of the maximum selling season; to provide the maximum rate of sales of leaf tobacco by warehousemen; to provide a means of identification of flue-cured leaf tobacco as to types sold in this State and a procedure connected therewith; to provide a penalty for violating

the provisions of section 13 by a licensee; to provide for identification tags for use in marketing tobacco in this state; to prohibit the mixing of type 14 tobacco with any other type of tobacco and to prescribe a means for the sale of such mixed tobacco; to provide for the registration of purchasers of tobacco for resale and a procedure connected therewith; to provide for the duties of Commissioner of Agriculture in conjunction with the administration and enforcement of this Act; to provide for certification by weighers for the weighing of tobacco at each warehouse and a procedure connected therewith; to provide for the revocation or suspension of any license or registration issued thereunder after notice and hearing and a procedure connected therewith; to provide for injunctions and a procedure connected therewith; to provide for rules and regulations; to provide for judicial review of administrative determinations or decisions and a procedure connected therewith; to provide for appeals and a procedure connected therewith; to provide for the impounding of records and commodities during investigation for violations of this Act and rules and regulations promulgated hereunder; to repeal Code Chapter 111-2 relating to statistics on leaf tobacco; to repeal an Act approved March 28, 1935 (Ga. L. 1935, p. 376), fixing a maximum charge for selling and handling leaf tobacco; to repeal an Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco; to define terms; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Intent.

Section 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a

means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama.

Auction licenses.

Section 2. No person real or corporate shall operate, hold or conduct an auction sale for the sale of flue-cured leaf tobacco within this State without having first obtained a license for the year in which the sale is made from the Commissioner. The license shall be for the calendar year and the license fee shall be $10.00 per each calendar year and shall expire on December 31 of each year and be subject to renewal under such rules and regulations as the Commissioner shall prescribe.

Same, bonds.

Section 3. As a prerequisite to the issuance of a license under the provisions of this Act, each applicant shall produce evidence to the Commissioner that he has in force for the calendar year for which license is sought a bond issued by a corporate entity authorized to do business in this State in the penal sum of $10,000.00. Such information shall show that the bond is in full force and effect and shall remain of full force and effect during the calendar year for which the license is sought. The bond shall be conditioned upon the licensee performing all the duties imposed upon him by law and the accounting for the proceeds of all flue-cured leaf tobacco received by him for sale and sold by him.

Charges by auction warehousemen.

Section 4. The maximum charges and expenses of handling and selling leaf tobacco by warehousemen licensed under this Act shall not exceed the following schedule, to-wit:

For auction fees, 15¢ on all piles or sheets of one hundred (100) pounds or less and twenty-five cents (25¢) on all piles or sheets over one hundred (100) pounds. For weighing and handling, ten cents (10¢) per pile or sheet for all piles or sheets of one hundred (100) pounds or less and ten cents (10¢) for each additional one hundred (100) pounds. For commissions on the gross sales of leaf tobacco in said warehouses not to exceed two and one-half per cent (2½%) of said gross sales.

Same, statements.

Section 5. The licensee of each and every warehouse shall render to each seller of tobacco of his warehouse an itemized statement plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commission on each sale.

Warehouse records, reports, etc.

Section 6. Each licensee shall keep a correct daily account of the number of pounds of leaf tobacco sold upon the floor of his warehouse. On or before Monday of each week, the licensee shall make a statement under oath of all of the tobacco sold upon the floor of his warehouse during the preceding week and shall transmit each report to the Commissioner. The report shall be so arranged and classified as to show the number of pounds of tobacco sold for producers, the number of pounds sold for dealers, and the number of pounds resold by the licensee for his own account or for the account of some other warehouse or licensee. In addition thereto each

licensee shall indicate the number of pounds of type 14 flue-cured leaf tobacco sold upon the floor of his warehouse for producers thereof and the number of pounds of type 14 flue-cured leaf tobacco sold by persons other than producers upon the floor of his warehouse. The licensee shall report the total number of pounds of other than type 14 flue-cured leaf tobacco sold for producers and persons other than producers. In addition thereto, each licensee shall make such additional reports as shall be prescribed by the Commissioner.

Records by Commissioner of Agriculture.

Section 7. The Commissioner shall cause to be kept and compiled the information submitted to him as to the sales of tobacco in this State. He shall cause such records to be kept in a manner so as to show the number of pounds of type 14 tobacco sold by each warehouse as well as the number of pounds of other than type 14 tobacco sold by each warehouse. He shall cause such records to be kept in a manner so as to show separately the number of pounds of type 14 tobacco and other types sold by producers and the number of pounds of each type of tobacco resold. The Commissioner of Agriculture is authorized to cause such information to be published in a manner that he deems most beneficial.

Advisory Board.

Section 8. To aid in the administration of this Act, there is hereby created an Advisory Board to be composed of nine (9) members. Three (3) members are to be members of the House of Representatives to be appointed by the Speaker of the House, and two (2) members are to be members of the Senate to be appointed by the President of the Senate. The members of the General Assembly shall be appointed from those members who are tobacco producers or in the absence of such producers in the General Assembly such members may

be appointed from the members of the General Assembly who represent the flue-cured leaf tobacco producing counties and districts of this State. One (1) member shall be the Commissioner of Agriculture, ex officio, or his representative, who shall be Chairman of the Board. One (1) member shall be a flue-cured leaf tobacco producer to be appointed by the Commissioner of Agriculture. One (1) member shall be the President of the Georgia Farm Bureau Federation, or his representative. One (1) member shall be a member of the Georgia Flue-Cured Tobacco Warehousemen's Association to be appointed by the President of that Association. The appointive members shall serve at the pleasure of the appointing officer. The members of the General Assembly shall receive the per diem and expense allowance provided for committee work of the General Assembly and such sums shall be paid from the funds appropriated for the operation of the General Assembly. The other appointive members of the Board shall be compensated in the amount of $15.00 per day for each day in attendance of the duties of the Board and shall be reimbursed for the necessary expenses incurred in the performance of their duties from the funds of the Department of Agriculture. The Commissioner shall be reimbursed for his expenses incurred in the performance of his duties. The members of the Board shall not receive the per diem provided herein for more than seven (7) days per year.

Same, meetings, etc.

Section 9. The Board shall meet in June of each year, or upon call of the Chairman, to survey the condition of the tobacco crop and recommend an opening date of the marketing season. The Chairman shall determine the time and place of the meeting. The Board shall recommend to the Commissioner a date for the opening of the tobacco marketing season. If the Commissioner approves

the opening date or if he deems it necessary for any other reason, he shall cause one or more members of the Board to attend the meeting of the Board of Governors of the Bright Belt Warehouse Association or its successors to make known the recommendation as to the opening of the marketing season in Georgia. If the Board of Governors of the Bright Belt Warehouse Association shall disapprove the recommended date or shall indicate an opening date for the tobacco marketing season in Georgia that is not in accordance with nor agreeable to the Tobacco Advisory Board or the Commissioner, the Commissioner shall determine the opening date of the tobacco marketing season in this State. If any licensee shall hold a sale prior to the date determined by the Commissioner, the license of the licensee shall stand revoked and shall not be reinstated or reissued in the calendar year of the revocation. The revocation provided herein shall be in addition to the other penalties provided for the violation of this Act. It is the intent and purpose of this section to provide a procedure for the fixing of the opening date of the tobacco marketing season and to place the final authority to fix said date in the Commissioner of Agriculture.

Marketing season.

Section 10. The flue-cured leaf tobacco marketing season shall continue for a minimum of twenty-seven (27) selling days after the opening date. The operating day of each flue-cured leaf tobacco warehouse shall not exceed five (5) actual selling hours and operating week of each such warehouse shall be limited to five (5) actual selling days, provided that no sale shall be held on Saturday or Sunday.

Same.

Section 11. If any warehouse has two (2) successive selling days during which the actual selling time is not

more than one (1) hour each day, then that particular warehouse shall be permitted to cease its operations but not before two (2) days have passed after the days that the actual selling time has not exceeded one (1) hour per day. The Commissioner may authorize a warehouse to cease operations at an earlier date than that provided herein when the Commissioner determines that the ceasing of operations by the warehouse is in the best interest of the marketing of tobacco.

Maximum sales.

Section 12. The maximum rate of sales at any such warehouse shall not exceed four hundred fifty (450) baskets during any one (1) hour nor shall the rate of sales during any one (1) day or week exceed four hundred and fifty (450) baskets per hour.

Tags for type 14 tobacco.

Section 13. (A) As an aid in providing positive identification of type 14 flue-cured leaf tobacco, it shall be the duty of each licensee to furnish white identification tags to identify type 14 tobacco. It shall be the duty of each licensee to cause such white identification tags to be placed upon each sheet of type 14 tobacco received in his warehouse for sale by requiring that producers, at the time of the receipt of tobacco in the warehouse submit proof of the origin of the tobacco to be sold. No licensee shall receive from any producer any tobacco for sale unless the licensee receives proof in the form of marketing cards, or other identification measures issued by the United States Department of Agriculture so as to definitely establish the origin of the tobacco. The licensee shall cause to be placed upon each sheet of type 14 tobacco a white sheet ticket that shall remain upon the sheet of tobacco at all times after receipt in the warehouse until after the sale of the sheet of tobacco and shall cause such ticket to have a carbon copy of the same

color that shall remain with the sheet of tobacco at all times subsequent to sale, as well as prior to the sale, that the tobacco remains in this State.

(B) Each licensee shall cause to be placed upon each sheet of other than type 14 tobacco received by him for sale, at the time of the receipt thereof, a colored identification tag of a color prescribed by the Commissioner that shall be attached to and shall remain in a conspicuous place at or near the top of the sheet of tobacco in such manner as to show to any person who desires to ascertain the type of tobacco offered for sale, or held for sale, that the tobacco is other than type 14. It shall be the duty of each licensee to ascertain at the time of the receipt of the tobacco to ascertain from producers or others the origin of the tobacco offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type.

(C) Each licensee receiving tobacco from persons other than producers for sale shall require that the origin of the tobacco be proven to his satisfaction so as to enable the licensee to properly identify the type of tobacco.

(D) Any licensee who shall indicate or permit to be indicated upon his premises any tobacco as type 14 when, in fact, such tobacco is not type 14 or any licensee who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment of not less than one year nor more than five years and shall be subject to a fine of not more than $5,000.00 or both such fine and imprisonment.

(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to

any person seeking to ascertain the type of tobacco offered for sale in this State.

Identification tags.

Section 14. It shall be the duty of each licensee to provide identification tags of the color prescribed by the Commissioner for the use in marketing tobacco in his warehouse. Each licensee shall submit proof to the Commissioner prior to the opening of the marketing season, at a time prescribed by the Commissioner, of each year of an adequate supply of the identification tags required for the operation of his warehouse during the subsequent marketing season. Identification tags shall be of the size, color, number of carbon copies, shape and provide for information as shall be prescribed by the Commissioner.

Resales of tobacco.

Section 15. Any person who shall purchase tobacco at auction for resale shall cause the tobacco so purchased to retain its identity as to type. Any person who shall mix type 14 tobacco with any other type of tobacco and who shall offer such mixed tobacco for sale shall cause such tobacco to be marketed and identified as other than type 14 tobacco. It shall be the duty of each purchaser for resale to retain the original identification ticket of each sheet of tobacco so purchased or a copy thereof and submit such sheets to the warehouse as a means of identification when the tobacco is offered for resale.

Same. licensing.

Section 16. It shall be unlawful for any person to purchase tobacco for resale without having first registered with the Commissioner of Agriculture. There shall be no fee for such registration and the Commissioner is authorized to revoke, suspend or cancel such registration after notice and hearing for any violation of this Act or any rule or registration promulgated hereunder.

Inspections.

Section 17. The Commissioner, himself or through his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner in such manner as to accurately show the origin and disposition of each type of flue-cured leaf tobacco.

Certified weighers.

Section 18. It shall be the duty of each licensee to provide a certified public weigher for the weighing of tobacco upon his premises and it shall be unlawful for any person to weigh tobacco for sale who is not a certified public weigher.

Enforcement of Act.

Section 19. It shall be the duty of the Commissioner to enforce the provisions of this Act and to utilize any employee of the Department of Agriculture in the performance of his duties hereunder. The Commissioner is authorized to revoke or suspend any license or registration issued hereunder after notice and hearing before the Commissioner.

Injunctions.

Section 20. In addition to the remedies provided herein and notwithstanding the existence of any other remedy of law and notwithstanding the pendency of any criminal prosecution, the Commissioner is authorized to apply to the Superior Court and such Court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate any of the provisions of this Act or for the failure or refusal to comply with the provisions of

this Act or any rule or regulation promulgated hereunder. Such injunction shall be issued without bond.

Rules.

Section 21. (a) Prior to adoption or change of any rules and regulations, the Commissioner shall promulgate the proposed promulgation or change and afford interested persons an opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule and regulation of the Commissioner who believes that the Commissioner in the promulgation or enforcement of such rule or regulation has exceeded the authority vested in him by the General Assembly under the Constitution of Georgia or United States shall have the right to petition the Commissioner for the repeal or rejection of such rule or regulation by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within thirty (30) days, and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within thirty (30) days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy and every person affected by any rule or regulation or any Act of the Commissioner is required to exhaust this remedy before taking any other steps.

(c) All hearings before the Commissioner shall be stenographically reported and shall be available to any interested party upon payment of the stenographic cost.

Review.

Section 22. **(a) Procedure.** (1) Any person aggrieved by a final decision or determination in any matter in which a hearing is required or authorized by this Act or by the State or Federal Constitution is entitled to judicial review thereof, provided that the judicial review herein afforded shall be exclusive judicial remedy for review of such decision or determination.

(2) Proceedings for review shall be instituted by filing a petition in the superior court of the county in which the Commissioner resides, within thirty (30) days after service of the final decision or determination of the Commissioner. Copies of the petition shall be served upon the Commissioner and all other parties of record. The court in its discretion may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the Commissioner's decision; but the Commission may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within thirty (30) days after service of the petition, or within such further time as the court may allow, the Commissioner shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding; the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to

present it in the proceeding before the Commissioner, the court may order that the additional evidence be taken before the Commissioner upon such conditions as the court may deem proper. The Commissioner may modify his findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modification or new findings or decision.

(b) Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the Commissioner, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(2) The court may affirm the decision of the Commissioner or remand the case for further proceedings before the Commissioner; or it may reverse or modify the decision or compel action unlawfully withheld, if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the Commissioner or affected by other error of law; or

(c) made upon unlawful procedure; or

(d) unsupported by substantial evidence as weighed in view of the entire record as submitted; or

(e) arbitrary or capricious.

(c) Appeals procedure. An aggrieved party may secure a review of any final judgment of the superior court under this Act by writ of error to the appropriate appellate court.

Suspension of licenses.

Section 23. At such time as the Commissioner deems there has been a violation of this Act and the rules and regulations promulgated hereunder, he shall have the power and authority to suspend the license or registration pending investigation of such violation and until such time as the violation has been corrected to the satisfaction of the Commissioner. During the period of time of any investigation of a violation, the Commissioner shall have the power and authority to impound all books and records and to preserve and maintain evidence until investigation is completed. Provided, however, that the investigation shall be completed at the earlist practicable time.

Code Chapter 111-2 repealed.

Section 24. Code Chapter 111-2, relating to statistics on leaf tobacco is hereby repealed in its entirety.

1935 Act repealed.

Section 25. An Act approved March 28, 1935 (Ga. L. 1935, p. 476), fixing a maximum charge for selling and handling leaf tobacco is hereby repealed in its entirety.

1955 Act repealed.

Section 26. An Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco, is hereby repealed in its entirety.

Crimes.

Section 27. Any person who shall violate any provision of this Act for which no specific punishment is provided herein shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

Section 28. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 7, 1960.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 42.

OCTOBER TERM, 1961.

(No. 687, October Term, 1960.)

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, INC., Intervenor,
Appellants,

vs.

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SWAINSBORO DIVISION.

BRIEF FOR THE APPELLEES.

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IN THE

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No. 42.

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PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, INC., Intervenor,
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WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SWAINSBORO DIVISION.

BRIEF FOR THE APPELLEES.

OPINION BELOW.

The Opinion of the United States District Court for the Southern District of Georgia, Swainsboro Division (R. 153-164) is reported at 189 F. Supp. 54.

JURISDICTION.

The jurisdiction of this Court to review the decision of the United States District Court by direct appeal is conferred by 28 U.S.C.A. 1253. The Opinion of the District Court was entered on November 9, 1960 (R. 153-164). The Judgment of the District Court was entered on November 9, 1960 (R. 165-166). The Notice of Appeal of Georgia Farm Bureau Federation, Inc., was filed December 7, 1960 (R. 166-168). The Notice of Appeal of Phil Campbell, Commissioner of Agriculture of the State of Georgia, was filed December 8, 1960 (R. 168-169). This Court noted probable jurisdiction and transferred the case to the Summary Calendar on April 3, 1961 (R. 170).

STATUTES INVOLVED.

Federal Tobacco Inspection Act, 7 U.S.C.A., §§ 511-511 q, set forth in Appendix as Exhibit "A".

Georgia Tobacco Identification Act, Georgia Laws 1960, pages 214 to 227 inclusive (Ga. Code Ann., Ch. 111-2), set forth in Appendix as Exhibit "B".

QUESTIONS PRESENTED.

The questions presented in this brief and argument are:

(1) The auction sales of tobacco are a part of, in, and themselves constitute interstate commerce.

(2) Do the identification provisions of the 1960 Georgia Tobacco Inspection Act that are complained of impose a burden upon interstate commerce that is prohibited by the commerce clause of the Federal Constitution?

(3) Has Congress shown its intention that there shall be a scheme of federal regulations for the classification, grading and typing of tobacco so pervasive as to require the inference that, within this field, no room can be left for state action?

(4) May the appellees (plaintiffs below) raise the constitutional question?

SUMMARY OF ARGUMENT.

Practically all of the tobacco sold at Georgia warehouses is purchased for shipment in interstate commerce and the operation of the warehouses and the auctions are subject to the provisions of the Federal Tobacco Inspection Act, 7 U.S.C.A., §§ 511-511 q.

The Georgia Tobacco Identification Act, Georgia Laws 1960, pages 214 to 227, inclusive, imposes on operators of tobacco auction warehouses selling flue-cured leaf tobacco the duty of placing a white tag on each sheet of type 14 tobacco and colored tag on each sheet of tobacco other than type 14. The Georgia Act defines type 14 tobacco as flue-cured leaf tobacco grown in the traditional loose-leaf area of Georgia, Alabama and Florida and the said act unconstitutionally burdens interstate commerce in that the statute, by defining type 14 tobacco on the basis of geographic origin alone, permits Georgia grown tobacco to command a higher price than similar tobacco grown in South Carolina and North Carolina.

The Federal Tobacco Inspection Act was intended by Congress to provide a scheme of federal regulations for the classification, grading and typing of tobacco and is so pervasive as to require the inference that, within the field, no room was left for state action, and consequently the Georgia Act setting up a conflicting typing classification for

tobacco is invalid, and is not within the police power of the state.

The appellees (plaintiffs below) are the owners and operators of tobacco auction warehouses and they have the right to question the constitutionality of provisions of the Georgia Act for the typing and tagging of tobacco, when compliance with the provisions of the Georgia Act has resulted in financial losses to them.

ARGUMENT.

1. The Auction Sales of Tobacco Are a Part of, in, and Themselves Constitute Interstate Commerce.

It is conceded by the appellants in their brief and argument that under the decisions of this Court the sale of tobacco at auction involves interstate commerce. *Currin* v. *Wallace*, 306 U.S. 1, 59 S. Ct. 379, 83 L. Ed. 441; *Townsend* v. *Yeomans*, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 1210.

2. Do the Identification Provisions of the 1960 Georgia Identification Act That Are Complained of Impose a Burden upon Interstate Commerce That Is Prohibited by the Commerce Clause of the Federal Constitution?

The stated purpose of the Tobacco Inspection Act, 7 U.S.C.A., §§ 511-511 q is as follows:

> "That transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; that such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; that the classification of tobacco according to type, grade, and other

characteristics affects the prices received therefor by producers; that without uniform standards of classification and inspections the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; that such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein." 7 U.S.C.A., § 511 a.

"The Secretary (of Agriculture) is authorized * * * to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined. * * * and he may modify any standards established under authority of this Act." 7 U.S.C.A., § 511 b.

Congress having granted authority to the Secretary of Agriculture to fix standards for flue-cured tobacco the Secretary of Agriculture promulgated regulations to that effect.

Under the regulations of the Secretary of Agriculture "Type" is defined as:

"A division of a class of tobacco having certain common charactertistics and closely related grades. Tobacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, *regardless of any factors of historical or geographical nature* which cannot be determined by an examination of the tobacco." 7 C.F.R., § 29.1096 (Emphasis added).

The "Grade" is defined as:

"A sub-division of a type according to group and quality, and according to color when it is of sufficient

importance to be treated as a separate factor." 7 C.F.R., § 29.1053.

Type 14 tobacco is defined as being:

> "That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama." 7 C.F.R., § 29.1100.

Subsequent to the promulgation of the rules and regulations by the Secretary of Agriculture, as authorized under the Tobacco Inspection Act, the State of Georgia passed an Act on March 7, 1960, designated as Georgia Laws, 1960, pages 214-227, inclusive.

Section 1 of the Georgia Statute provides:

> "It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner, and to provide a means of identification of types of flue-cured leaf tobacco sold in this state to the end that all producers thereof may be assured of the positive identification of the tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida and Alabama."

The Georgia Statute further provides:

> "Section 13 (A) as an aid in providing positive identification of type 14 flue-cured leaf tobacco, it shall be the duty of each licensee to furnish white identification tags to identify type 14 tobacco. It shall

be the duty of each licensee to cause such white identification tags to be placed upon each sheet of type 14 tobacco received in his warehouse for sale by requiring that producers, at the time of the receipt of tobacco in the warehouse submit *proof of the origin of the tobacco to be sold.* No licensee shall receive from any producer any tobacco for sale unless the licensee receives proof in the form of marketing cards, or other identification measures issued by the United States Department of Agriculture *so as to definitely establish the origin of the tobacco.* The licensee shall cause to be placed upon each sheet of type 14 tobacco, white sheet ticket that shall remain upon the sheet of tobacco at all times until after the sale of the tobacco and shall cause such ticket to have a carbon copy of the same color that shall remain with the sheet of tobacco at all times subsequent to sale, as well as prior to the sale, that the tobacco remains in this State." (Emphasis added).

"(B) Each licensee shall cause to be placed upon each sheet of other than type 14 tobacco received by him for sale, at the time of the receipt thereof, a colored identification tag of a color prescribed by the Commissioner that shall be attached to and shall remain in a conspicuous place at or near the top of the sheet of tobacco in such manner as to show to any person who desires to ascertain the type of tobacco offered for sale, or held for sale, that the tobacco is other than type 14. It shall be the duty of each licensee to ascertain at the time of the receipt of the tobacco to ascertain from producers or others *the origin of the tobacco* offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type." (Emphasis added).

"(C) Each licensee receiving tobacco from persons other than producers for sale *shall require that the origin of the tobacco be proven to his satisfaction so as to enable the licensee to properly identify the type of tobacco.*" (Emphasis added).

"(D) Any licensee who shall indicate or permit to be indicated upon his premises any tobacco as type 14 when, in fact, such tobacco is not type 14 or any licensee who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment of not less than one year nor more than five years and shall be subject to a fine of not more than $5,000.00 or both such fine and imprisonment."

"(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State."

Pursuant to the requirements of the Georgia Act the defendant, Phil Campbell, as Commissioner of Agriculture of the State of Georgia, issued instructions and regulations requiring all warehousemen to place white identification tags on all tobacco sold in the State of Georgia whose origin was in the State of Georgia, Alabama or Florida. He caused blue identification tags to be placed on all tobacco offered for sale in the State of Georgia whose origin was outside of the territorial limits of the State of Georgia, Alabama or Florida.

The tobacco selling season commenced on July 28, 1960, and all that day and the next day all tobacco sold in the State of Georgia was positively identified as to its origin.

Chaos raged rampant. The tobacco buying companies refused to buy pile after pile of tobacco bearing blue identification to such an extent that the auction sale of tobacco was forced to be stopped at some of the warehouses.

The official graders of the United States Department of Agriculture graded all of the tobacco prior to its being

offered for sale. There was a great disparity in price for the identical grade of tobacco bearing white identification tags and the tobacco bearing blue identification tags. The price disparity for the identical grade of tobacco ranged as much as $18.00 per hundred pounds of tobacco. The tobacco growers in North Carolina and South Carolina virtually ceased shipping their tobacco to Georgia for sale.

After this suit was filed and Phil Campbell, Commissioner of Agriculture of the State of Georgia, was enjoined and restrained from the use of blue identification tags, designating the origin of the tobacco offered for sale, the tobacco market immediately stabilized. The price differential between identical grades of tobacco, regardless of the geographical origin of the tobacco, became minute and each pile of tobacco was sold on the basis of its own grade and other characteristics without the price being adversely affected because of its geographical origin.

We do not want to burden this Court with our interpretation of the evidence adduced in the trial of this before the three judge court; however, we would like to point out the fact that every witness for the appellants, upon question by the trial court, testified that the classification of type 14 tobacco was based on its origin in the State of Georgia, Alabama and Florida.

The stipulation of the parties and the undisputed evidence in the record unequivocally prove that the Georgia Act, in identifying tobacco as to type based solely upon the geographical origin of the tobacco, is the only cause of the disparity in price and the unreasonable burden on the free flow of interstate commerce.

In the opinion of the three judge trial court it was held as follows:

> "Both the purpose and effect of the Georgia enactment were to make a distinction at the markets, by

the color tags, between tobacco grown in Georgia and that grown elsewhere. The effect was to create a wide disparity of price between the two groups of tobacco, the Carolina growers receiving a much lower amount. This resulted in losses of business to the plaintiff warehousemen. The Georgia statute imposes upon the producers of tobacco in other (fol. 254) states who bring their products into that state for sale onerous burdens which it does not impose upon Georgia growers. This is a discrimination in favor of the citizens of Georgia against the citizens of other states. It is a discrimination against goods in commerce grown outside of Georgia in favor of like commodities produced in that state. These discriminations result in an injury not only to non-resident tobacco producers but to those engaged in the operation of the markets. The Federal Constitution forbids such discrimination as an unlawful interference with interstate commerce. *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 45 S. Ct. 481, 69 L. Ed. 909; 11 Am. Jur. 96, Commerce, § 108. See *Best & Co.* v. *Maxwell*, 311 U.S. 454, 61 S. Ct. 334, 85 L. Ed. 275; *Brimmer* v. *Rebman*, 138 U.S. 78, 11 S. Ct. 213, 34 L. Ed. 862. The prohibition 'continues until the commodity has ceased to be subject of discriminating legislation by reason of its foreign character.' *Welton* v. *State of Missouri*, 1 Otto (91 U.S.) 275, 23 L. Ed. 347. Whether the discrimination is also a violation of the equal protection clause of the Constitution is a question which we need not decide. Cf. *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (fol. 255)." (Record, pages 160-161).

We respectfully show that on appeal the testimony and inferences therefrom are viewed in the light most favorable to the prevailing party below, *Daniel* v. *U. S.*, C.A. 5th, 234 F.2d 102, certiorari denied 77 S. Ct. 362, 352 U.S. 971, 1 L. Ed. 2d 324. See also *U. S.* v. *U. S. Gypsum Co.*, 68 S. Ct. 525, 333 U.S. 364, 92 L. Ed. 746.

Appellants do not deny the adverse conditions existing on the tobacco market during the period of time that the Georgia Act was enforced and all tobacco offered for sale was identified as to its geographical origin. They seek to escape responsibility for the price discrimination and closing down of sales by saying that the only participation of the state was to identify type 14 tobacco and that any subsequent effect arose from the action of the tobacco buyers.

We say that this contention was answered by this Court in the case of *Near* v. *Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625, where it was held:

> "* * * it is enough to say that in passing upon Constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

Further in the case of *Lockner* v. *New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539, this Court ruled:

> "The purpose of a statute must be determined from the natural and legal effect of the language employed. And whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota* v. *Barker*, 136 U.S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U.S. 78, 34 L. Ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. The Court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064."

3. Has Congress Shown Its Intention That There Shall Be a Scheme of Federal Regulations for the Classification, Grading and Typing of Tobacco So Pervasive As to Require the Inference That Within This Field, No Room Can Be Left for State Action?

In answer to this question the Federal Act speaks for itself in that:

> "* * * without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; * * * constitute a burden upon commerce and make the use of uniform standards * * * imperative for the protection of producers and others engaged in commerce and the public interest therein." 7 U.S.C.A., § 511 a.

Congress authorized the Secretary of Agriculture upon investigation to:

> "* * * establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States, * * * and he may modify any standards established under authority of this Act, whenever, in his judgment, such action is advisable." 7 U.S.C.A., § 511 b.

The Secretary of Agriculture has, by proper rules and regulations, carried out the statutory plan set forth by Congress.

Despite the fact that Congress, under the provisions of the Tobacco Inspection Act, manifested its intention to occupy the entire field in regulating the auction sales of flue-cured tobacco as a part of interstate commerce, the

State of Georgia seeks to usurp the constitutional powers of Congress and place its own regulatory power on the auction sales of tobacco.

> "When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist. After Congress acts on a matter within its exclusive jurisdiction, there is no division of the field of regulation." *Erie Railroad Company* v. *New York*, 233 U.S. 671, 58 L. Ed. 1149, 34 Sup. Ct. Rep. 756.
>
> "Power of Congress to regulate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than prescribed in the Constitution." *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U.S. 334, 81 L. Ed. 270, 57 Sup. Ct. Rep. 277.
>
> "The rule that a state may impose regulations under its police power which are valid, though effecting interstate commerce, at least until Congress takes possession of the field under its superior authority, does not apply where the state undertakes to regulate interstate commerce by imposing burdens on it." *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 42 S. Ct. 244, 66 L. Ed. 458.
>
> "If a state statute unlawfully burdens interstate commerce, the reserved powers of the State under the Tenth Amendment will not save it." *Morgan* v. *Virginia*, 328 U.S. 373, 90 L. Ed. 1317, 66 Sup. Ct. Rep. 1050.
>
> "State statutes are unconstitutional, if they have an adverse effect on interstate commerce, though such matter is local in character." *Kansas City Southern Ry. Co.* v. *Daniel*, C.A. 5, 180 F.2d 910.
>
> "Congress under its power to regulate interstate commerce, may occupy the entire field or it may limit its regulations, and when it does occupy the entire

field, then regulation by a commission is void. Congress is not required to occupy the entire field, and until it does so occupy the entire field, the states have a large area over which they may exercise their power appropriate to their jurisdiction. This rule does not apply to interstate commerce demanding uniformity of regulations. With reference to that situation the state is without power because the Constitution itself occupies the field in that class of cases, even though there be no federal legislation." *Thompson v. McDonald*, C.C.A. 5, 95 F.2d 937, aff. 305 U.S. 263, 83 L. Ed. 164, 59 Sup. Ct. Rep. 176.

At the trial before the three judge court on August 16 and 17, 1960, evidence was introduced by the appellants to the effect that the Georgia markets were being flooded with untied flue-cured tobacco brought in from the Carolinas, and that unless such Carolina tobacco was identified as to its geographical origin, the tobacco industry in Georgia would be ruined. The defendants contend that for this reason it is to the interest of the Georgia tobacco farmers that the Act of the General Assembly of Georgia of 1960 should be enforced.

This argument is well answered in the case of *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 42 S. Ct. 244, 66 L. Ed. 458, where the Court held as follows:

> "It is alleged that such legislation is in the interest of grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

By a North Dakota Act, the State attempted to exercise control over all wheat buying within that state and in the case of *Shafer* v. *Farmers Grain Company*, 268 U.S. 189, 45 S. Ct. 481, 69 L. Ed. 909, the Supreme Court on pages 485-486 held as follows:

> "A state statute which by its necessary operation directly interferes with or burdens interstate commerce is a prohibited regulation and is invalid, regardless of the purpose with which it is enacted * * * Obviously, therefore, the control of this buying is of concern to the people of other states as well as those of North Dakota * * *."
>
> "The defendants make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that there can be no justification for the existence of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interest of all the states that are effected."
>
> "The defendants further contend that the act is simply an attempt on the part of the state, through inspection regulations, to assist in carrying out the purpose of the United States Grains Standard Act. We think that the act discloses an attempt to do more * * *. Aside from the adoption of the grades established and promulgated under the federal act, we find little in the state act to support and much to refute the assertion that it is merely an attempt to carry out the purpose of the federal act."

In the case of *Stafford* v. *Wallace*, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397, it was ruled:

> "2. It is for Congress to decide from its general information and from special evidence brought before

it, the nature of the evils, present or threatening, and to enact such legislation within its power as it deems necessary to remedy them, and this environment should be considered by the courts-in interpreting the scope and effect of the act in order to determine its validity."

The right of Congress to prescribe the conditions under which tobacco can be sold in interstate commerce was determined by this Court in the case of *Currin* v. *Wallace*, 95 F.2d 856, Aff. 306 U.S. 1, 83 L. Ed. 441, 59 S. Ct. 379, wherein it was ruled as follows:

"There is no permissible constitutional theory which would apply this principle to purchase of livestock as in the *Swift* and *Stafford* cases, and of grain as in the *Lemke* and *Shafer* cases, and deny its application to tobacco. In the *Lemke Case* (*supra*, 258 U.S. at pp. 60, 61, 66 L. Ed. 464, 465, 42 S. Ct. 244) condemning the effort of a State to control the buying of grain for shipment to other States, the Court referred to the power of Congress to provide its own regulations for such transactions, saying 'It is alleged that such legislation is in the interest of the grain growers, and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed.' And again, in the *Shafer Case* (*supra*, 268 U.S. at pp. 198, 199, 69 L. Ed. 914, 915, 45 S. Ct. 481), the Court said: 'The right to buy it (grain) for shipment, and to ship it, in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution.' * * *Having this authority to regulate the sales of the tobacco market, Congress could prescribe the conditions under which the sales

should be made in order to give protection to seller or purchaser or both. Congress is not to be denied the exercise of its Constitutional authority in prescribing regulations merely because these may have the quality of police regulations. It is on that principle that misbranding under the Food and Drug Act embraces false or misleading statements as to the ingredients of commodities of the effects of their use. See *Seven Cases* v. *United States*, 239 U.S. 510, 60 L. Ed. 411, 36 S. Ct. 190, L.R.A. 1916D, 164. Inspection and the establishment of standards for commodities has been regarded from the colonial days as appropriate to the regulation of trade and the authority of the States to enact inspection laws is recognized by the Constitution. Art. 1, § 10, cl. 2. See *Turner* v. *Maryland*, 107 U.S. 38, 39, 51-54, 27 L. Ed. 370, 371, 375, 376, 2 S. Ct. 44; *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 181, 80 L. Ed. 138, 143, 56 S. Ct. 159, 101 A.L.R. 853. But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress. See *Turner* v. *Maryland*, *supra* (107 U.S. at pp. 57, 58, 27 L. Ed. 377, 378, 2 S. Ct. 44). And Congress has long exercised this authority in enacting laws for inspections and the establishment of standards in relation to various commodities involved in transaction in interstate or foreign commerce. The fact that the inspection and grading of tobacco take place before the auction does not dissociate the former from the latter, but on the contrary it is obvious that the inspection and grading have immediate relation to the sales in interstate and foreign commerce which Congress thus undertakes to govern."

In the case of *Townsend* v. *Yeomans*, 301 U.S. 441, 57 Sup. Ct. Rep. 842, 81 L. Ed. 1210, the Court in speaking of Title 7, U.S.C.A., Section 511 *et seq.*, said as follows of Congress in enacting said legislation:

"It sought to aid tobacco growers by establishing and promoting the use of standards of classification

and by maintaining an official inspection service. It was found that the farmer had 'no definite system of grades of his own', that the private grading system used by the buyer was kept 'strictly confidential' so that 'without Government standards the farmer had no definite guide for sorting his tobacco', and that hence 'farmers generally are unable to class their tobacco correctly to meet the trade's demand'. To meet this need, the Act authorized the Secretary of Agriculture to make investigation and to establish standards for tobacco 'by which its type, grade, size, condition, or other characteristics' might be determined. (Section 3, (7 U.S.C.A., Section 511 b))."

In the case of *Mulford* v. *Smith*, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092, the Supreme Court was called upon to pass upon the constitutionality of the Agriculture Adjustment Act of 1938, 7 U.S.C.A., Sec. 1281 *et seq.* In holding that the Act was constitutional the Court said in part as follows:

"It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where the tobacco enters the stream of commerce—the marketing warehouse. The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred percent of the tobacco so sold is purchased by extrastate purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales. This Court has recently declared that sales of tobacco by growers through warehouseman to purchasers for removal outside of the state constitute interstate commerce. Any rule, such as that embodied in the Act, (Agricultural

Adjustment Act of 1938) which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to absolute prohibition of such commerce, and a fortiori to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation."

Transactions involving the sale of tobacco at auction are effected with the public interest and are not matters of local concern. In the case of *Sligh* v. *Kirkwood*, 237 U.S. 52, 59 L. Ed. 835, 35 S. Ct. 501, this Court said:

"That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is asserted by the State, even in the exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; * * *"

In *The Minnesota Rate Cases*, 230 U.S. 352, 57 L. Ed. 1511, this Court held:

"If a State enactment imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free; * * * The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons* v. *Ogden*, 9 Wheat 1, 196, 6 L. Ed. 23, 70. The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the States vied in discriminatory

measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times to secure the freedom of interstate commerce, intercourse from state control, and to provide effective regulation of that intercourse as the National interest may demand * * * There is no room in our scheme of government for the assertion of State Power in hostility to the authorized exercise of Federal power. * * * It has been repeatedly been declared by this Court as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation." (Cases cited). * * *. The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. If this is but to hold that the States are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save it is governed in the manner that the National legislature constitutionally ordains."

In the case of *Milk Control Board of Pa.* v. *Eisenberg Farm Products*, 306 U.S. 346, 83 L. Ed. 752, this Court held:

"When people declared 'The Congress shall have Power * * *. To regulate Commerce * * * among the several States,' * * * their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. The grant of the power of regulation to the Congress necessarily implies the subordination

> of the states to that power. This Court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulations must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. * * * None of the decisions on which the Court below and the respondent rely rules in the instant case. *Di Santo* v. *Pennsylvania*, 273 U.S. 34, 71 L. Ed. 524, 47 S. Ct. 267, involved a state law directed at foreign commerce; *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 66 L. Ed. 458, 42 S. Ct. 244, condemned a State statute affecting commerce, over ninety percent of which was interstate, and essaying to regulate the price of commodities sold within the state payable and receivable in the state of destination; *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 69 L. Ed. 909, 45 S. Ct. 481, also dealt with a state law intended to regulate commerce almost wholly interstate in character."

The appellants, in their brief and argument, contend that the Georgia Act makes an attempt to merely adopt the Federal definition as to the type of tobacco and require identification as to type. They state that the differences in the definitions are negligible and of no consequence with some minor changes in terminology, and that it is completely consistent with Section 3 of the Federal Act, by which the Secretary of Agriculture is authorized to establish standards by which its type, grade, size, etc., may be determined, and that the standards adopted by the Secretary of Agriculture shall be the official standards of the United States. We contend that

since Congress has authorized the Secretary of Agriculture to establish official standards of the United States for tobacco, that Congress has pre-empted the field, and the State of Georgia cannot act in any manner. In the case of *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 91 L. Ed. 1447, 67 S. Ct. 1146, the Court said as follows:

> "He could not be required by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act. * * * The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the Federal scheme prevails, though it is a more modest, less pervasive regulatory plan than that of the State. By that test each of the nine matters we have listed is beyond the reach of the Illinois Commission, since on each one Congress has disclosed its policy in the Warehouse Act. The provisions of Illinois law on those subjects must therefore give way by virtue of the Supremacy Clause. U. S. Const., Art. VI, cl. 2."

As one of the authorities the appellants cite to sustain their argument that Congress has not pre-empted the field so as to deprive the State of Georgia of the regulation of the auction sale of tobacco is the case of *Rice et al.* v. *Chicago Board of Trade*, 331 U.S. 247, 91 L. Ed. 1468, 67 S. Ct. 1160. We say that that case is not applicable to the case at bar in that the Court held:

> "* * * and § 4c provides that 'nothing in this section or § 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections.' * * * Thus the provisions in § 4c serves the function of preventing supersedure and preserving state control in two areas where state and federal law overlap."

There is nothing in the Federal Tobacco Inspection Act whereby Congress provided for the prevention of supersedure and preserving of state control in areas where state and federal law overlap.

That Congress has taken upon itself the right to control all phases of tobacco production is beyond dispute. The Secretary of Agriculture has been empowered by Congress to control the varieties of tobacco grown, so as to discourage the planting of the discount varieties; he controls the number of acres of tobacco planted; he designates tobacco auction markets; he has established 168 grades for tobacco which are the official standards of the United States; he has all tobacco graded by an official grader of the United States Department of Agriculture immediately prior to the sale; he designates the number of baskets of tobacco a set of tobacco buyers may buy each day and the number of days per week tobacco may be sold on the auction market. Further, Congress has, under the Stabilization Program, seen fit to guarantee the farmer ninety per cent of parity for his tobacco based upon the grade placed thereon by the official graders of the U. S. Department of Agriculture and should said tobacco, on the auction sale, bring less than the guaranteed government price, the tobacco is purchased under the stabilization program. On these facts, it can be readily seen that Congress has exercised its right and authority to control all phases of tobacco production from the planting of the seed until the final sale of the tobacco by the producer.

4. May the Appellees (Plaintiffs Below) Raise the Constitutional Question?

Complainants alleged in the original complaint and the evidence adduced at the trial proved that huge sums of money had been invested in the construction and equipping

of their tobacco auction warehouses, that the said warehouses were primarily designed and equipped for the auction sales of tobacco and unless they were operated for that purpose the buildings and equipment would become practically worthless, that they had expended large sums of money contacting growers to bring tobacco to their warehouses for sale, that they sold the growers' tobacco on a commission basis, that at least fifty per cent of the tobacco sold in their warehouses has its geographical origin outside of the State of Georgia, that as a result of the enforcement of the Georgia Tobacco Identification Act the tobacco growers in North Carolina and South Carolina could not sell their tobacco or suffered a disparity in price with the identical grade of Georgia tobacco of as much as $18.00 per hundred pounds, that the tobacco growers in the Carolinas had virtually ceased shipping their tobacco to complainants' warehouses as long as the Georgia Act was being enforced, that during the time the said act was enforced complainants had lost thousands of dollars in commissions that they would have received had the Carolina tobacco not been discriminated against and that complainants were in immediate danger of losing their occupation and investment as a result of the enforcement of the Georgia Tobacco Inspection Act.

In the opinion of the three judge trial Court (Record, Page 163), it was held as follows:

> "As has been noted the intervenor questions the right of the warehousemen to question the constitutionality of the Georgia statutory provision. We shall assume that the objection of the intervenor may properly be made. The Federal Courts have ever been reluctant to pass upon the validity of state statutes when attacked as violative of rights guaranteed by the United States Constitution. Only those who have been injured as the result of a denial of (fol. 258) those rights

can invoke Federal jurisdiction on constitutional questions. *Voeller* v. *Nielston Co.*, 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322. The provisions which the plaintiffs assail directly bear upon them in the operation of their businesses. It is upon them that the act imposes the duty of placing the tags, white or colored, upon the tobacco. It is clearly established that compliance with these provisions has resulted in financial losses to the plaintiffs as well as to the growers from other states who desired to market their tobacco at the plaintiffs' warehouses. This being so, the plaintiffs may bring and maintain the action. 11 Am. Jur. 748 et seq., Constitutional Law, § 111."

Premier-Pabst Sales Co. v. *Grosscup*, 298 U.S. 226, 80 L. Ed. 1155, 56 S. Ct. 754, holds:

"One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional features injures him."

In the case of *Massachusetts* v. *Millan*, 262 U.S. 447, 43 S. Ct. 597, 601, 67 L. Ed. 1078, this Court ruled:

"The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is in immediate danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In the case of *Savage* v. *Jones*, 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715, the Court on page 720, in passing on the right of complainants to raise constitutional questions, said as follows:

"In answer, it must again be said that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business * * *' This was interstate commerce, in the freedom of which from any unconstitutional burden the com-

plainant had a direct interest * * * If the statute of Indiana, as applied to sales by importing purchases in the original package constitute an unwarrantable interference with interstate commerce in the complainant's products, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands." See also *Tyler* v. *Registration Court Judges*, 179 U.S. 405, 45 L. Ed. 252, 21 S. Ct. 206; *Turpin* v. *Lemon*, 187 U.S. 51, 47 L. Ed. 70, 23 S. Ct. 20; *Heald* v. *District of Columbia*, 259 U.S. 114, 123, 66 L. Ed. 852, 42 S. Ct. 434.

It is respectfully submitted that the appellees (complainants below) are in a position to raise the constitutional question.

CONCLUSION.

Appellees respectfully show that based on the allegations in the complaint, the stipulation of the parties and the overwhelming weight of the evidence the judgment of the Court below was not only authorized but was, in fact, demanded and that the said judgment should be affirmed.

Respectfully submitted,

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EXHIBIT "A".

The Tobacco Inspection Act.

[Public—No. 314—74th Congress.]

[H. R. 8026.]

AN ACT

To establish and promote the use of standards of classification for tobacco, to provide and maintain an official tobacco inspection service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when used in this Act—

(a) "Person" includes partnerships, associations, and corporations, as well as individuals.

(b) "Secretary" means the Secretary of Agriculture of the United States.

(c) "Inspector" means any person employed, licensed, or authorized by the Secretary to determine and certify the type, grade, condition, or other characteristics of tobacco.

(d) "Sampler" means any person employed, licensed, or authorized by the Secretary to select, tag and seal official samples of tobacco.

(e) "Weigher" means any person employed, licensed, or authorized by the Secretary to weigh and certify the weight of tobacco.

(f) "Tobacco" means tobacco in its unmanufactured form.

(g) "Auction market" means a market or place to which tobacco is delivered by the producers thereof, or their agents, for sale at auction through a warehouseman or commission merchant.

(h) Words in the singular form shall be deemed to import the plural form when necessary.

(i) "Commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purposes of this Act (but not in any wise limiting the foregoing definition) a transaction in respect to tobacco shall be considered to be in commerce if such tobacco is part of that current of commerce usual in the tobacco industry whereby tobacco or products manufactured therefrom are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Tobacco normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possessions of the United States, and foreign nations.

Sec. 2. That transactions in tobacco involving the sale thereof at auction as commonly conducted at auction mar-

kets are affected with a public interest; that such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; that the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; that without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; that such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein.

Sec. 3. That the Secretary is authorized to investigate the sorting, handling, conditioning, inspection, and marketing of tobacco from time to time, and to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States, and shall become effective immediately or upon a date specified by the Secretary: Provided, That the Secretary may issue tentative standards for tobacco prior to the establishment of official standards therefor, and he may modify any standards established under authority of this Act whenever, in his judgment, such action is advisable.

Sec. 4. That the Secretary is authorized to demonstrate the official standards; to prepare and distribute, upon request, samples, illustrations, or sets thereof; and to make reasonable charges therefor: Provided, That in no event

shall charges be in excess of the cost of said samples, illustrations, and services so rendered.

Sec. 5. That the Secretary is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce. Before any market is designated by the Secretary under this section he shall determine by referendum the desire of tobacco growers who sold tobacco at auction on such market during the preceding marketing season. The Secretary may at his discretion hold one referendum for two or more markets or for all markets in a type area. No market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting favor it. The Secretary shall have access to the tobacco records of the Collector of Internal Revenue and of the several collectors of internal revenue for the purpose of obtaining the names and addresses of growers who sold tobacco on any auction market, and the Secretary shall determine from said records the eligibility of such grower to vote in such referendum, and no grower shall be eligible to vote in more than one referendum. After public notice of not less than thirty days that any auction market has been so designated by the Secretary, no tobacco shall be offered for sale at auction on such market until it shall have been inspected and certified by an authorized representative of the Secretary according to the standards established under this Act, except that the Secretary may temporarily suspend the requirement of inspection and certification at any designated market whenever he finds it impracticable to provide for such inspection and certification because competent inspectors are not obtainable or because the quantity of tobacco available for inspection is insufficient to justify the cost of such service: Provided, That, in the event com-

petent inspectors are not available, or for other reasons, the Secretary is unable to provide for such inspection and certification at all auction markets within a type area, he shall first designate those auction markets where the greatest number of growers may be served with the facilities available to him. No fee or charge shall be imposed or collected for inspection or certification under this section at any designated auction market. Nothing contained in this Act shall be construed to prevent transactions in tobacco at markets not designated by the Secretary or at designated markets where the Secretary has suspended the requirement of inspection or to authorize the Secretary to close any market.

Sec. 6. That the Secretary, independently or in cooperation with other branches of the Government, State agencies, or persons, whether operating in one or more jurisdictions, is authorized to employ and/or license competent persons as samplers to take official samples of tobacco, or as weighers to weigh and certify the weight of tobacco, or as inspectors of tobacco to determine and certify, upon the request of the owner or other financially interested person, the type, grade, weight, condition, and/or such other facts as the Secretary may deem necessary.

The Secretary is authorized to fix and collect such fees or charges in the administration of this section as he may deem reasonable, and the moneys collected, except as provided in this section, shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts. Fees or charges collected under an agreement with a State, municipality, or person, or by an individual licensed to inspect or weigh or sample tobacco under this Act, may be disposed of in accordance with the terms of such agreement or license. Charges for expenses for travel and subsistence incurred by inspectors or weighers or samplers

employed by the Secretary when required to be paid by the applicant for service, may be credited to the appropriation, or any other funds authorized in this Act from which they were paid.

This section is intended merely to provide for the furnishing of services upon request of the owner or other person financially interested in tobacco to be sampled, inspected, or weighed and shall not be construed otherwise.

Sec. 7. That the Secretary shall provide for such reinspection or appeal inspection of tobacco as he may deem necessary for the confirmation or reversal of certificates issued under this Act. Each inspection certificate issued under this Act, unless invalidated or superseded in accordance with the regulations of the Secretary, shall be received in all courts and by all officers and employees of the United States as prima facie evidence of the truth of the statements therein contained.

Sec. 8. That warehousemen shall provide space on warehouse tickets or other tags or labels used by them for showing the grade of the lot covered thereby as determined by an authorized tobacco inspector under this Act. The Secretary may prescribe, by regulation, the form in which such certification of grade shall be shown, and may require that a copy of such warehouse ticket, tag, or label shall be furnished to the Secretary.

Sec. 9. That the Secretary is authorized to collect, publish, and distribute, by telegraph, mail, or otherwise without cost to the grower, timely information on the market supply and demand, location, disposition, quality, condition, and market prices for tobacco.

Sec. 10. It shall be unlawful—

(a) For any person to use the words "United States", "Government", or "Federal", or any abbreviation thereof, in, or in connection with, any statement relating to the grade of tobacco when such grade is not, in fact, one of the grades for tobacco according to the standards of the United States.

(b) For any person falsely to make, issue, alter, forge, or counterfeit, or aid, cause, procure, or assist in or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate, stamp, tag, seal, label, or other writing purporting to be issued or authorized under this Act.

(c) For any person, not an authorized inspector under this Act, to issue a certificate or report stating the type, grade, size, or condition of any lot of tobacco to be in accordance with the standards of the United States therefor which is of such color, size, arrangement, or wording as to be mistaken for a certificate issued under this Act, unless such certificate states in prominent letters in its heading that it is not issued under authority of the United States.

(d) For any person employed, designated, or licensed by the Secretary as an inspector, sampler, or weigher of tobacco under this Act knowingly to inspect, sample, or weigh improperly, or to issue any false certificate under this Act, or to accept money or other consideration, directly or indirectly, for any neglect or improper performance of duty as an inspector, sampler, or weigher.

(e) For any person improperly to influence or to attempt improperly to influence or forcibly to assault, resist, impede, or interfere with any inspector, sampler, weigher,

or other person employed, designated, or licensed by the Secretary in the execution of his duties under this Act: Provided, however, That nothing herein shall operate to prevent the owner of tobacco from appealing or protesting, in accordance with regulations of the Secretary, the grade certified for his tobacco.

(f) For any person falsely to represent or otherwise indicate that he is authorized by the Secretary to inspect, sample, or weigh tobacco under this Act.

(g) For any person to substitute, or attempt to substitute, following inspection or sampling or weighing under this Act, other tobacco for tobacco actually inspected or sampled or weighed, or in the case of tobacco inspected in auction warehouses for any person not so authorized by the Secretary to remove any certificate of grade from any lot of tobacco prior to the sale of such lot.

(h) For any person falsely to represent that tobacco has been inspected, sampled, or weighed under this Act; or knowingly to have made any false representation concerning tobacco inspected under this Act; or knowing that tobacco is to be offered for inspection or sampling under this Act to load, pack, or arrange such tobacco in such manner as knowingly to conceal foreign matter or tobacco of inferior grade, quality, or condition; or for any person knowing that tobacco has been so loaded, packed or arranged, to offer it for inspection or sampling without disclosing such knowledge to the inspector or sampler before inspection or sampling.

(i) For any person willfully to alter an official sample of tobacco by removing or plucking leaves or otherwise, or for any person knowing that an official sample of tobacco has been so altered, thereafter to represent such sample as an official sample.

Sec. 11. The Secretary is authorized to publish the facts regarding any violation of this Act.

Sec. 12. That any person violating any provision of sections 5 and 10 of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Sec. 13. In construing and enforcing the provisions of this Act; the act, omission, or failure of any agent, officer, or other person acting for or employed by an association, partnership, corporation, or firm, within the scope of his employment or office, shall be deemed to be the act, omission, or failure of the association, partnership, corporation, or firm, as well as that of the person.

Sec. 14. The Secretary is authorized to make such rules and regulations and hold such hearings as he may deem necessary to effectuate the purposes of this chapter and may cooperate with any other Department or agency of the Government; any State, territory, district, or possession, or department, agency, or political subdivision thereof; purchasing and consuming organizations, boards of trade, chambers of commerce, or other associations of business men or trade organizations; or any person, whether operating in one or more jurisdictions in carrying on the work herein authorized; and he shall have the power to appoint, suspend, remove, and fix the compensation of all officers, employees, and licensees not in conflict with existing law. The Secretary is authorized to make such expenditures for rent outside of the District of Columbia, printing, binding, telegrams, telephones, books of reference, publications, furniture, stationery, office and laboratory equipment, travel, tobacco for use in preparing and demor. rating standards, and other supplies and expenses, including reporting services, as shall be necessary

to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for administering this chapter.

Sec. 15. That in carrying on the work herein authorized, the Secretary, or any officer or employee designated by him for such purpose, shall have power to hold hearings, administer oaths, sign and issue subpenas, examine witnesses, and require the production of books, records, accounts, memoranda, and papers. Upon refusal by any person to appear, testify, or produce books, records, accounts, memoranda and papers in response to a subpena, the proper United States district court shall have power to compel obedience thereto.

Sec. 16. That if any provision of this Act or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Sec. 17. That any duties devolving upon the Secretary of Agriculture by virtue of the provisions of this Act may with like force and effect be executed by such officer or officers, agent or agents, of the Department of Agriculture as the Secretary may designate for the purpose.

Sec. 18. That this Act may be cited as "The Tobacco Inspection Act."

Approved, August 23, 1935. As amended, October 28, 1949.

EXHIBIT "B".

Agriculture—Regulation of Sales of Flue-Cured Tobacco.

Code Chapter 111-2 Repealed.

No. 557 (House Bill No. 717).

An Act to regulate the sale of flue-cured leaf tobacco in this State so as to enable producers to have an adequate time to properly cure, prepare, and market flue-cured leaf tobacco; to provide a means of identifying all types of flue-cured leaf tobacco sold in this State and a procedure connected therewith, to provide for the licensing and bonding of operators of flue-cured leaf tobacco and a procedure connected therewith and a license fee; to provide for the bonding of operators of tobacco warehouses, the amount thereof, and the conditions of such bond; to provide the maximum charges and expenses of handling and selling leaf tobacco in this State; to provide that statements of charges shall be submitted by the warehouseman to the seller of tobacco; to provide for records to be kept by licensee to show the origin and amount of tobacco sold by him and a procedure connected therewith; to provide for the duties of the Commissioner of Agriculture in compiling statistics relative to the sale of leaf tobacco; to create an advisory board and to provide its composition, the duties of the members thereof and their compensation; to provide for the setting of the opening date of the tobacco marketing season in this State and to provide a procedure connected therewith; to provide a minimum tobacco marketing season in this State and a procedure for the ceasing of operations of a warehouse prior to the expiration of the maximum selling season; to provide the maximum rate of sales of leaf tobacco by warehousemen; to provide a means of identification of flue-cured leaf to-

bacco as to types sold in this State and a procedure connected therewith; to provide a penalty for violating the provisions of section 13 by a licensee; to provide for identification tags for use in marketing tobacco in this state; to prohibit the mixing of type 14 tobacco with any other type of tobacco and to prescribe a means for the sale of such mixed tobacco; to provide for the registration of purchasers of tobacco for resale and a procedure connected therewith; to provide for the duties of Commissioner of Agriculture in conjunction with the administration and enforcement of this Act; to provide for certification by weighers for the weighing of tobacco at each warehouse and a procedure connected therewith; to provide for the revocation or suspension of any license or registration issued thereunder after notice and hearing and a procedure connected therewith; to provide for injunctions and a procedure connected therewith; to provide for rules and regulations; to provide for judicial review of administrative determinations or decisions and a procedure connected therewith; to provide for appeals and a procedure connected therewith; to provide for the impounding of records and commodities during investigation for violations of this Act and rules and regulations promulgated hereunder; to repeal Code Chapter 111-2 relating to statistics on leaf tobacco; to repeal an Act approved March 28, 1935 (Ga. L. 1935, p. 376), fixing a maximum charge for selling and handling leaf tobacco; to repeal an Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco; to define terms; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Intent.

Section 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a

means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama.

Auction Licenses.

Section 2. No person real or corporate shall operate, hold or conduct an auction sale for the sale of flue-cured leaf tobacco within this State without having first obtained a license for the year in which the sale is made from the Commissioner. The license shall be for the calendar year and the license fee shall be $10.00 per each calendar year and shall expire on December 31 of each year and be subject to renewal under such rules and regulations as the Commissioner shall prescribe.

Same, Bonds.

Section 3. As a prerequisite to the issuance of a license under the provisions of this Act, each applicant shall produce evidence to the Commissioner that he has in force for the calendar year for which license is sought a bond issued by a corporate entity authorized to do business in this State in the penal sum of $10,000.00. Such information shall show that the bond is in full force and effect and shall remain of full force and effect during the calendar year for which the license is sought. The bond shall be conditioned upon the licensee performing

all the duties imposed upon him by law and the accounting for the proceeds of all flue-cured leaf tobacco received by him for sale and sold by him.

Charges by Auction Warehousemen.

Section 4. The maximum charges and expenses of handling and selling leaf tobacco by warehousemen licensed under this Act shall not exceed the following schedule, to-wit:

For auction fees, 15¢ on all piles or sheets of one hundred (100) pounds or less and twenty-five cents (25¢) on all piles or sheets over one hundred (100 pounds. For weighing and handling, ten cents (10¢) per pile or sheet for all piles or sheets of one hundred (100) pounds or less and ten cents (10¢) for each additional one hundred (100) pounds. For commissions on the gross sales of leaf toacco in said warehouses not to exceed two and one-half per cent (2½%) of said gross sales.

Same, Statements.

Section 5. The licensee of each and every warehouse shall render to each seller of tobacco of his warehouse an itemized statement plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commission on each sale.

Warehouse Records, Reports, Etc.

Section 6. Each licensee shall keep a correct daily account of the number of pounds of leaf tobacco sold upon the floor of his warehouse. On or before Monday of each week, the licensee shall make a statement under oath of all of the tobacco sold upon the floor of his warehouse during the preceding week and shall transmit each

report to the Commissioner. The report shall be so arranged and classified as to show the number of pounds of tobacco sold for producers, the number of pounds sold for dealers, and the number of pounds resold by the licensee for his own account or for the account of some other warehouse or licensee. In addition thereto each licensee shall indicate the number of pounds of type 14 flue-cured leaf tobacco sold upon the floor of his warehouse for producers thereof and the number of pounds of type 14 flue-cured leaf tobacco sold by persons other than producers upon the floor of his warehouse. The licensee shall report the total number of pounds of other than type 14 flue-cured leaf tobacco sold for producers and persons other than producers. In addition thereto, each licensee shall make such additional reports as shall be prescribed by the Commissioner.

Records by Commissioner of Agriculture.

Section 7. The Commissioner shall cause to be kept and compiled the information submitted to him as to the sales of tobacco in this State. He shall cause such records to be kept in a manner so as to show the number of pounds of type 14 tobacco sold by each warehouse as well as the number of pounds of other than type 14 tobacco sold by each warehouse. He shall cause such records to be kept in a manner so as to show separately the number of pounds of type 14 tobacco and other types sold by producers and the number of pounds of each type of tobacco resold. The Commissioner of Agriculture is authorized to cause such information to be published in a manner that he deems most beneficial.

Advisory Board.

Section 8. To aid in the administration of this Act, there is hereby created an Advisory Board to be com-

posed of nine (9) members. Three (3) members are to be members of the House of Representatives to be appointed by the Speaker of the House, and two (2) members are to be members of the Senate to be appointed by the President of the Senate. The members of the General Assembly shall be appointed from those members who are tobacco producers or in the absence of such producers in the General Assembly such members may be appointed from the members of the General Assembly who represent the flue-cured leaf tobacco producing counties and districts of this State. One (1) member shall be the Commissioner of Agriculture, ex officio, or his representative, who shall be Chairman of the Board. One (1) member shall be a flue-cured leaf tobacco producer to be appointed by the Commissioner of Agriculture. One (1) member shall be the President of the Georgia Farm Bureau Federation, or his representative. One (1) member shall be a member of the Georgia Flue-Cured Tobacco Warehousemen's Association to be appointed by the President of that Association. The appointive members shall serve at the pleasure of the appointing officer. The members of the General Assembly shall receive the per diem and expense allowance provided for committee work of the General Assembly and such sums shall be paid from the funds appropriated for the operation of the General Assembly. The other appointive members of the Board shall be compensated in the amount of $15.00 per day for each day in attendance of the duties of the Board and shall be reimbursed for the necessary expenses incurred in the performance of their duties from the funds of the Department of Agriculture. The Commissioner shall be reimbursed for his expenses incurred in the performance of his duties. The members of the Board shall not receive the per diem provided herein for more than seven (7) days per year.

Same, Meetings, etc.

Section 9. The Board shall meet in June of each year, or upon call of the Chairman, to survey the condition of the tobacco crop and recommend an opening date of the marketing season. The Chairman shall determine the time and place of the meeting. The Board shall recommend to the Commissioner a date for the opening of the tobacco marketing season. If the Commissioner approves the opening date or if he deems it necessary for any other reason, he shall cause one or more members of the Board to attend the meeting of the Board of Governors of the Bright Belt Warehouse Association or its successors to make known the recommendation as to the opening of the marketing season in Georgia. If the Board of Governors of the Bright Belt Warehouse Association shall disapprove the recommended date or shall indicate an opening date for the tobacco marketing season in Georgia that is not in accordance with nor agreeable to the Tobacco Advisory Board or the Commissioner, the Commissioner shall determine the opening date of the tobacco marketing season in this State. If any licensee shall hold a sale prior to the date determined by the Commissioner, the license of the licensee shall stand revoked and shall not be reinstated or reissued in the calendar year of the revocation. The revocation provided herein shall be in addition to the other penalties provided for the violation of this Act. It is the intent and purpose of this section to provide a procedure for the fixing of the opening date of the tobacco marketing season and to place the final authority to fix said date in the Commissioner of Agriculture.

Marketing Season.

Section 10. The flue-cured leaf tobacco marketing season shall continue for a minimum of twenty-seven (27)

selling days after the opening date. The operating day of each flue-cured leaf tobacco warehouse shall not exceed five (5) actual selling hours and operating week of each such warehouse shall be limited to five (5) actual selling days, provided that no sale shall be held on Saturday or Sunday.

Same.

Section 11. If any warehouse has two (2) successive selling days during which the actual selling time is not more than one (1) hour each day, then that particular warehouse shall be permitted to cease its operations but not before two (2) days have passed after the days that the actual selling time has not exceeded one (1) hour per day. The Commissioner may authorize a warehouse to cease operations at an earlier date than that provided herein when the Commissioner determines that the ceasing of operations by the warehouse is in the best interest of the marketing of tobacco.

Maximum Sales.

Section 12. The maximum rate of sales at any such warehouse shall not exceed four hundred fifty (450) baskets during any one (1) hour nor shall the rate of sales during any one (1) day or week exceed four hundred and fifty (450) baskets per hour.

Tags for Type 14 Tobacco.

Section 13. (A) As an aid in providing positive identification of type 14 flue-cured leaf tobacco, it shall be the duty of each licensee to furnish white identification tags to identify type 14 tobacco. It shall be the duty of each licensee to cause such white identification tags to be placed upon each sheet of type 14 tobacco received

in his warehouse for sale by requiring that producers, at the time of the receipt of tobacco in the warehouse submit proof of the origin of the tobacco to be sold. No licensee shall receive from any producer any tobacco for sale unless the licensee receives proof in the form of marketing cards, or other identification measures issued by the United States Department of Agriculture so as to definitely establish the origin of the tobacco. The licensee shall cause to be place upon each sheet of type 14 tobacco a white sheet ticket that shall remain upon the sheet of tobacco at all times after receipt in the warehouse until after the sale of the sheet of tobacco and shall cause such ticket to have a carbon copy of the same color that shall remain with the sheet of tobacco at all times subsequent to sale, as well as prior to the sale. that the tobacco remains in this State.

(B) Each licensee shall cause to be placed upon each sheet of other than type 14 tobacco received by him for sale, at the time of the receipt thereof, a colored identification tag of a color prescribed by the Commissioner that shall be attached to and shall remain in a conspicuous place at or near the top of the sheet of tobacco in such manner as to show to any person who desires to ascertain the type of tobacco offered for sale, or held for sale, that the tobacco is other than type 14. It shall be the duty of each licensee to ascertain at the time of the receipt of the tobacco to ascertain from producers or others the origin of the tobacco offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type.

(C) Each licensee receiving tobacco from persons other than producers for sale shall require that the origin of the tobacco be proven to his satisfaction so as to enable the licensee to properly identify the type of tobacco.

(D) Any licensee who shall indicate or permit to be indicated upon his premises any tobacco as type 14 when, in fact, such tobacco is not type 14 or any licensee who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment of not less than one year nor more than five years and shall be subject to a fine of not more than $5,000.00 or both such fine and imprisonment.

(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State.

Identification Tags.

Section 14. It shall be the duty of each licensee to provide identification tags of the color prescribed by the Commissioner for the use in marketing tobacco in his warehouse. Each licensee shall submit proof to the Commissioner prior to the opening of the marketing season, at a time prescribed by the Commissioner, of each year of an adequate supply of the identification tags required for the operation of his warehouse during the subsequent marketing season. Identification tags shall be of the size, color, number of carbon copies, shape and provide for information as shall be prescribed by the Commissioner.

Resales of Tobacco.

Section 15. Any person who shall purchase tobacco at auction for resale shall cause the tobacco so purchased to retain its identity as to type. Any person who shall mix type 14 tobacco with any other type of tobacco and who shall offer such mixed tobacco for sale shall cause

such tobacco to be marketed and identified as other than type 14 tobacco. It shall be the duty of each purchaser for resale to retain the original identification ticket of each sheet of tobacco so purchased or a copy thereof and submit such sheets to the warehouse as a means of identification when the tobacco is offered for resale.

Same, Licensing.

Section 16. It shall be unlawful for any person to purchase tobacco for resale without having first registered with the Commissioner of Agriculture. There shall be no fee for such registration and the Commissioner is authorized to revoke, suspend or cancel such registration after notice and hearing for any violation of this Act or any rule or registration promulgated hereunder.

Inspections.

Section 17. The Commissioner, himself or through his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner in such manner as to accurately show the origin and disposition of each type of flue-cured leaf tobacco.

Certified Weighers.

Section 18. It shall be the duty of each licensee to provide a certified public weigher for the weighing of tobacco upon his premises and it shall be unlawful for any person to weigh tobacco for sale who is not a certified public weigher.

Enforcement of Act.

Section 19. It shall be the duty of the Commissioner to enforce the provisions of this Act and to utilize any

employee of the Department of Agriculture in the performance of his duties hereunder. The Commissioner is authorized to revoke or suspend any license or registration issued hereunder after notice and hearing before the Commissioner.

Injunctions.

Section 20. In addition to the remedies provided herein and notwithstanding the existence of any other remedy of law and notwithstanding the pendency of any criminal prosecution, the Commissioner is authorized to apply to the Superior Court and such Court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate any of the provisions of this Act or for the failure or refusal to comply with the provisions of this Act or any rule or regulation promulgated hereunder. Such injunction shall be issued without bond.

Rules.

Section 21. (a) Prior to adoption or change of any rules and regulations, the Commissioner shall promulgate the proposed promulgation or change and afford interested persons an opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule and regulation of the Commissioner who believes that the Commissioner in the promulgation or enforcement of such rule or regulation has exceeded the authority vested in him by the General Assembly under the Constitution of Georgia or United States shall have the right to petition the Commissioner for the repeal or rejection of such rule or regulation by

pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within thirty (30) days, and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within thirty (30) days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy and every person affected by any rule or regulation or any Act of the Commissioner is required to exhaust this remedy before taking any other steps.

(c) All hearings before the Commissioner shall be stenographically reported and shall be available to any interested party upon payment of the stenographic cost.

Review.

Section 22. **(a) Procedure.** (1) Any person aggrieved by a final decision or determination in any matter in which a hearing is required or authorized by this Act or by the State or Federal Constitution is entitled to judicial review thereof, provided that the judicial review herein afforded shall be exclusive judicial remedy for review of such decision or determination.

(2) Proceedings for review shall be instituted by filing a petition in the superior court of the county in which the Commissioner resides, within thirty (30) days after service of the final decision or determination of the Commissioner. Copies of the petition shall be served upon the Commissioner and all other parties of record. The

court in its discretion may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the Commissioner's decision; but the Commission may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within thirty (30) days after service of the petition, or within such further time as the court may allow, the Commissioner shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding; the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the Commissioner, the court may order that the additional evidence be taken before the Commissioner upon such conditions as the court may deem proper. The Commissioner may modify his findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modification or new findings or decision.

(b) Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregulari-

ties in procedure before the Commissioner, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(2) The court may affirm the decision of the Commissioner or remand the case for further proceedings before the Commissioner; or it may reverse or modify the decision or compel action unlawfully withheld, if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the Commissioner or affected by other error of law; or

(c) made upon unlawful procedure; or

(d) unsupported by substantial evidence as weighed in view of the entire record as submitted; or

(e) arbitrary or capricious.

(c) Appeals procedure. An aggrieved party may secure a review of any final judgment of the superior court under this Act by writ of error to the appropriate appellate court.

Suspension of Licenses.

Section 23. At such time as the Commissioner deems there has been a violation of this Act and the rules and regulations promulgated hereunder, he shall have the power and authority to suspend the license or registration pending investigation of such violation and until such time as the violation has been corrected to the satisfaction of the Commissioner. During the period of time of

any investigation of a violation, the Commissioner shall have the power and authority to impound all books and records and to preserve and maintain evidence until investigation is completed. Provided, however, that the investigation shall be completed at the earliest practicable time.

Code Chapter 111-2 Repealed.

Section 24. Code Chapter 111-2, relating to statistics on leaf tobacco is hereby repealed in its entirety.

1935 Act Repealed.

Section 25. An Act approved March 28, 1935 (Ga. L. 1935, p. 476), fixing a maximum charge for selling and handling leaf tobacco is hereby repealed in its entirety.

1955 Act Repealed.

Section 26. An Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco, is hereby repealed in its entirety.

Crimes.

Section 27. Any person who shall violate any provision of this Act for which no specific punishment is provided herein shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

Section 28. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 7, 1960.

No. 42.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

(No. 687, October Term, 1960.)

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, INC., Intervenor,
Appellants,

vs.

WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SWAINSBORO DIVISION.

PROOF OF SERVICE.

Georgia, Emanuel County.

I, HOMER S. DURDEN, JR., of counsel for the Appellees herein, hereby certify that on the 26th day of September, 1961, I Served copies of the foregoing Brief for the Appellees on counsel for the Appellants by mailing

a copy in a duly addressed envelope with first class postage prepaid to their attorneys as follows:

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I further certify that I have in like manner served copies of the said brief and argument on the following, who are not Appellants, but are parties of interest:

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 42

PHIL CAMPBELL, COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, ET AL., APPELLANTS

v.

WILLIAM HUSSEY, JR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the United States District Court for the Southern District of Georgia (R. 153–164) is reported at 189 F. Supp. 54.

JURISDICTION

The judgment of the district court was entered on November 9, 1960 (R. 165). Notices of appeal were filed on December 7 and December 8, 1960 (R. 166, 168). This Court noted probable jurisdiction on April 3, 1961 (R. 170).

QUESTIONS PRESENTED

1. Whether the Federal Tobacco Inspection Act occupies the field of tobacco classification and iden-

tification in auction markets so as to preclude the State of Georgia from legislating concerning the classification and identification of tobacco in those markets.

2. Whether the Georgia Tobacco Identification Act conflicts with the Federal Tobacco Inspection Act and the regulatory scheme established pursuant to its provisions.

STATUTES INVOLVED

The pertinent provisions of the federal Tobacco Inspection Act of August 23, 1935, 49 Stat. 731, 7 U.S.C. 511, and the Georgia Tobacco Identification Act of March 7, 1960, 1960 Ga. Laws 214, are set forth in the Appendix, *infra*, pp. 34–59.

STATEMENT

This appeal is from a judgment of a three-judge district court (convened pursuant to 28 U.S.C. 2281, 2284) permanently enjoining defendants, officials of the State of Georgia, from enforcing the Georgia Tobacco Identification Act of 1960, 1960 Ga. Laws 214. The court determined that the Georgia Act (1) placed an invalid burden upon interstate commerce, (2) operated in a field occupied by the federal Tobacco Inspection Act of 1935, 49 Stat. 731, 7 U.S.C. 511, so as to leave no room for state legislation, and (3) was in direct conflict with the federal legislation and the regulations promulgated thereunder.

This brief is submitted in response to the Court's invitation to the Solicitor General to set forth the views of the United States (R. 170). As the interest of the United States is confined to the relation of the

Georgia statute to the federal Tobacco Inspection Act, *supra*, and the regulatory program established thereunder, our brief will be restricted to a consideration of whether the Georgia statute is valid in view of that Act and program.

1. THE FEDERAL TOBACCO CLASSIFICATION AND IDENTIFICATION PROGRAM

Federal tobacco classification standards were first promulgated by the Secretary of Agriculture in 1926,[1] under the United States Warehouse Act of August 11, 1916,[2] which required the classification, in accordance with standards established by the Secretary, of any agricultural product stored in a warehouse which, upon its application, became a licensee under the terms of the Act. These standards were expanded and reissued in 1929[3] under the Tobacco Stocks and Standards Act of January 14, 1929,[4] authorizing their use for purposes of the collection and publication of statistics by the Secretary. Finally, in the federal Tobacco Inspection Act of 1935, Congress again authorized tobacco classification standards, but this time made it mandatory that tobacco sold in designated auction markets be classified in accordance with those standards.

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[1] Department of Agriculture, Bureau of Agricultural Economics, Misc. Cir. No. 55, "Type Classification of American-Grown Tobacco," issued January 1926. See 7 C.F.R. 103.70.

[2] Section 19, 39 Stat. 489, as amended, 7 U.S.C. 257.

[3] Department of Agriculture, Bureau of Agriculture Economics, Service and Regulatory Announcement No. 118, "Classification of Leaf Tobacco Covering Classes, Types, and Groups of Grades," issued November 1929, 7 C.F.R. Part 30.

[4] Section 2, 45 Stat. 1079, as amended, 7 U.S.C. 502.

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In enacting the federal Tobacco Inspection Act of 1935, 49 Stat. 731, 7 U.S.C. 511 (App., *infra*, pp. 34-43), Congress determined (Section 2, 7 U.S.C. 511a) that the sale of tobacco at auction markets, as commonly conducted, is in interstate commerce and "affected with a public interest"; that "the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers"; and that "without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in [interstate] commerce" and constitute a burden upon that commerce. These conditions, Congress declared, "make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in [interstate] commerce and the public interest therein" (*ibid.*).

To that end, Congress authorized the Secretary of Agriculture, after investigation, "to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States" (Section 3, 7 U.S.C. 511b). In addition, the Secretary was empowered to "modify any standards established under authority of this Act whenever, in his judgment, such action is advisable" (*ibid.*).

These "uniform standards of classification" are to be applied in the following manner: upon the affirma-

tive vote of two-thirds of the growers of tobacco sold in an auction market, the Secretary may designate that market as one in which tobacco moves in interstate commerce. After due public notice of this designation, no tobacco is to be offered for sale at auction in that market "until it shall have been inspected and certified by an authorized representative of the Secretary according to the standards established under this Act" (Section 5, 7 U.S.C. 511d). The Act further provides that the Secretary shall provide for reinspection and for an appellate inspection for the purpose of confirming or reversing the classification first made (Section 7, 7 U.S.C. 511f).

The classification made on the inspection of the tobacco is to be certified on the warehouse ticket or on such other tag or label as shall be furnished by the warehouseman at the auction house and this certificate is to be received in all courts and by all federal officers and employees as prima facie evidence of the truth of the statements contained therein (Sections 7, 8, 7 U.S.C. 511f, 511g).[4]

Pursuant to the authority granted him under the Act, the Secretary has promulgated standards for the classification of tobacco which divide tobacco into various classes, types, groups, and grades. A *class* is

[4] In addition to providing for mandatory inspection and classification at designated auction markets, the Act authorizes the Secretary to provide, for a fee, inspection and classification of tobacco at other locations when it is requested by a person financially interested in the tobacco to be inspected (Section 6, 7 U.S.C. 511e). The Act also authorizes the collection and publication of information on market conditions and provides criminal penalties for various specified acts (Sections 9, 10, 7. U.S.C. 511h, 511i).

defined as a "major division of tobacco based on characteristics caused by varieties, soils, or climatic conditions, and the method of cultivation, harvesting, or curing" (7 C.F.R. 29.1040). A class is subdivided into *types,* which are "division[s] of a class of tobacco having certain common characteristics and closely related grades. Tobacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination of the tobacco" (7 C.F.R. 29.1096). A type is in turn subdivided into *grades* "according to group and quality, and according to color when it is of sufficient importance to be treated as a separate factor" (7 C.F.R. 29.1053). A *group* is defined as a "division of a type covering several closely related grades based on the general quality of the tobacco, including body, the percentage of injury, and other characteristics" (7 C.F.R. 29.1055).[*]

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[*] Certain additional terms are given specific meanings. For example, *quality* is defined as a "division or group, forming the second factor of a grade, based upon the relative degree of one or more of the elements of quality in tobacco, construed in relation to the type as a whole unless otherwise specifically restricted, as in the element 'color shade' which is restricted to a given color" (7 C.F.R. 29.1073). *Condition* is defined as the "state of tobacco in storage or in relation to its preparation for storage, with reference to its manner of preparation or its degree of fermentation such as undried, air-dried, steam-dried, sweating, sweated, and resweated" (7 C.F.R. 29.1043). *Color* is defined as a "subdivision of a group based on the relative hues, saturations, and brilliances common to the group and on certain elements of quality such as body and maturity which are closely related to color" (7 C.F.R. 29.1042).

Pursuant to regulations and rules promulgated by the Secretary,[1] the inspection certificate must show, *inter alia*, "the type and grade of the tobacco," each of which is to be "based upon a thorough examination of the lot of tobacco to be certificated" (7 C.F.R. 29.66(b), 29.75, 29.79, 29.109, 29.1144, 29.1145). Any "interested party"[2] may obtain review of this certification by the certifying inspector or by a supervisor (7 C.F.R. 29.132), and in addition he has a right to appeal to the Director of the Tobacco Division, Agricultural Marketing Service, United States Department of Agriculture, or his designee, whose findings "shall be final" (7 C.F.R. 29.17, 29. 90–99).

Among the classes of tobacco established by the Secretary is one for "flue-cured tobacco"[3] (7 C.F.R. 29.1001–1225). This class is divided into four types:

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[1] Section 14 of the Act, 7 U.S.C. 511m, authorizes the Secretary "to make such rules and regulations * * * as he may deem necessary to effectuate the purposes of this Act * * *."

[2] "Interested party" is defined as the "owner or other financially interested person; including the warehouseman, commission merchant, association, and other person who has the tobacco in his custody for sale; the authorized agent of the owner; and persons to whom or by whom the tobacco has been sold on the basis of a certificate issued, or sample prepared, under the act, but not including a person who is negotiating for its purchase" (7 C.F.R. 29.28).

[3] "Cured" is defined as "[t]obacco thoroughly dried of its sap by either natural or artificial processes" (7 C.F.R. 29.1045). "Flue-cured" is defined as "tobacco cured under artificial atmospheric conditions by a process of regulating the heat and ventilation without allowing smoke or fumes from the fuel to come in contact with the tobacco; or tobacco cured by some other process which accomplishes the same results" (7 C.F.R. 29.1050).

11,[10] 12,[11] 13,[12] and 14. Type 14—the type involved in this case—is defined by the Secretary as "[t]hat type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama" (7 C.F.R. 29.1100).

2. THE GEORGIA TOBACCO IDENTIFICATION PROGRAM

The Georgia Tobacco Identification Act of March 7, 1960, 1960 Ga. Laws, 214 (App., *infra*, pp. 44–59), was enacted "to provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be

[10] Type 11 is defined as "[t]hat type of flue-cured tobacco commonly known as Western Flue-cured or Old Belt and Middle Belt Flue-cured, produced principally in the Piedmont sections of Virginia and North Carolina and the district extending eastward to the coastal plains region. That portion of this type known as Old Belt Flue-cured, normally characterized by a heavier body and darker color shade and produced principally in the Piedmont sections of Virginia and North Carolina, may be classified as Type 11a; and that portion of the type known as Middle Belt Flue-cured, normally characterized by a thinner body and lighter color shade and produced principally in a section lying between the Piedmont and coastal plains regions of Virginia and North Carolina, may be classified as Type 11b" (7 C.F.R. 29.1097).

[11] Type 12 is "[t]hat type of flue-cured tobacco commonly known as Eastern Flue-cured, New Belt of North Carolina Flue-cured, or Eastern Carolina Flue-cured, produced principally in the coastal plains section of North Carolina, north of the South River" (7 C.F.R. 29.1098).

[12] Type 13 is "[t]hat type of flue-cured tobacco commonly known as Southeastern Flue-cured, South Carolina Flue-cured, or New Belt of South Carolina, produced principally in the coastal plains section of South Carolina and the southeastern counties of North Carolina, south of the South River" (7 C.F.R. 29.1099).

assured of the positive identification of tobacco sold in this State" (Section 1)." The Act provides, among other things, for licensing and bonding any person operating an auction sale of flue-cured tobacco in Georgia (Sections 2 and 3), maximum rates to be charged (Section 4), rendering of statements (Section 5), keeping of records (Sections 6, 7), a minimum marketing season, and a maximum marketing day and week (Sections 10–12).

The statute defines "Type 14 flue-cured leaf tobacco" as "that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama" (Section 1). It provides that, "[a]s an aid in providing positive identification of type 14 flue-cured tobacco," each auction warehouseman shall cause "white identification tags to be placed upon each sheet of type 14 tobacco received in his warehouse for sale by requiring that producers, at the time of the receipt of tobacco in the warehouse submit proof of the origin of the tobacco to be sold" (Section 13(A)). Each sheet of "other than type 14 tobacco" is to be identified by a colored tag (Section 13(B)). The auction warehouseman is given the positive duty "to ascertain from producers or others the origin of the tobacco offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type" (*idid.*)

" In the preamble to the Act, the Georgia legislature stated that its purpose was, *inter alia*, "to provide a means of identifying all types of flue-cured leaf tobacco sold in this State"; and "to provide for identification tags for use in marketing tobacco in this State * * *."

3. THE PROCEEDINGS IN THE DISTRICT COURT

Appellees, producers of tobacco and auction warehousemen, instituted this action for a declaration that the tobacco classification and identification provisions of the Georgia Act, *supra*, are null and void, and for an order enjoining the enforcement of those provisions of the Act (R. 1, 10, 23).

By stipulation (R. 26–27) and at trial it was developed that there is a mobility in the merchandising of tobacco which has a bearing on the operation of the Georgia statute. For example, approximately fifty percent of the flue-cured tobacco sold at the five auction markets of northern Georgia comes from outside Georgia, some from as far away as Virginia and Missouri, though most of the out-of-state tobacco is produced in the Carolinas (R. 27, 54, 56, 57, 64–66, 72–73, 75, 84, 85, 96). The tobacco, after being weighed at the tobacco houses, is placed in line on the warehouse floor for sale (R. 72). It is typed and graded by a federal inspector, acting under the Federal Tobacco Inspection Act (R. 72, 120–21). The sale is then conducted by an auctioneer, with from seven to eight seconds spent on each bundle of tobacco (R. 72, 114).

On the two days that the identification provisions of the Georgia Tobacco Identification Act were in effect (prior to the issuance of a restraining order by the court below) blue tags were placed on tobacco grown outside Georgia and white tags on that produced within Georgia (R. 67–69). The different colored tags were placed on tobacco identically typed

and graded by the federal inspectors—that is, certain tobacco certified by the federal inspector as Type 14 under the standards established by the Secretary of Agriculture was given a blue tag, indicating that under the standards of the Georgia Tobacco Identification Act the tobacco was not Type 14 (R. 62, 68, 77).

The district court held the identification provisions of the Georgia Tobacco Identification Act to be invalid for three separate reasons:

First, the court held that the Georgia statute constitutes an unlawful interference with interstate commerce by imposing an onerous burden on tobacco grown outside of Georgia in favor of like tobacco produced in that state (R. 161).

Second, the court held that Congress in enacting the Tobacco Inspection Act had so occupied the field of tobacco classification and identification that the challenged portions of the Georgia Act could not stand. The court referred to the recitation of purpose in Section 2 of the federal Act, 7 U.S.C. 511a, that "uniform standards of classification and inspection" were "imperative" to prevent "unreasonable fluctuations in prices and quality determinations" that "constitute a burden upon commerce" (R. 161). "This language," the court went on, "shows the intent of Congress that there shall be a scheme of Federal regulation for the classification, grading and typing of tobacco so pervasive as to require the inference that, within this field, no room would be left for state action" (R. 162).

Finally, the court held the Georgia classification standards for tobacco to be in "direct conflict" with

the federal statute and regulations (R. 163). While the Georgia standard is based entirely on geographic origin, the federal standards, though referring to the area in which each type of tobacco is "produced principally," required that "tobaccos which have the same characteristics and corresponding qualities, colors and lengths are to be treated as one type even though grown on different sides of a boundary between two states" (R. 160).

SUMMARY OF ARGUMENT

The federal Tobacco Inspection Act of 1935, 49 Stat. 731, 7 U.S.C. 511 (App., *infra*, pp. 34–43), was enacted to meet the need for uniform national standards of tobacco classification and impartial inspection of tobacco by a disinterested person in order to provide both buyers and sellers in the auction markets with useable information concerning the classification of the various lots of tobacco offered for sale. To achieve this purpose, Congress authorized the Secretary of Agriculture "to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined" (Section 3, 7 U.S.C. 511b). In addition, the Act prescribes that tobacco offered for sale be inspected and classified by federal inspectors in accordance with the federal standards and that the classification be communicated to the buyers and sellers (Section 5, 7 U.S.C. 511d).

The Secretary has implemented this Act with classification standards and regulations. The standards divide tobacco into classes, which are subdivided into types; types in turn are subdivided into groups and grades (7 C.F.R. 29.1040, 29.1053, 29.1055, 29.1096).

Within the flue-cured class of tobacco there are four types. One of these, Type 14, is defined as "[t]hat type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama" (7 C.F.R. 29.1100). But the regulations also provide that "[t]obacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination of the tobacco" (7 C.F.R. 29.1096), and it is clear that under the federal regulatory scheme tobacco meeting the characteristics of Type 14 is to be so classified, regardless of where it is grown. To make the federal classification known, the Secretary has prescribed that the classification assigned to a lot of tobacco shall be communicated to the seller and potential buyer by means of an inspection certificate and an oral announcement prior to the auction (7 C.F.R. 29.66(b), 29.79, 29.80, 29.1144).

In contrast, the Georgia Tobacco Identification Act, 1960 Ga. Laws 214 (App. *infra*, pp. 44–59) establishes its own standard, based solely on place of production, to differentiate Type 14 flue-cured tobacco from other types (Sections 1, 13 (A), (B), (C)); and it prescribes its own special method of communicating that information to the buyers and sellers (Section 13(A)). The result during the two days the Georgia statute was in actual operation was that certain tobacco was classified as Type 14 under the federal statute and classified as another type under the Georgia statute—

with each determination communicated to the buyers and sellers in accordance with the procedures prescribed by the statute and regulations of each jurisdiction.

In these circumstances, it is plain that the classification and indentification provisions of the Georgia statute are invalid because they invade a field—the area of classification and identification of tobacco sold through auction markets—comprehensively covered by the federal statute and regulations. It is immaterial whether the Georgia statute conflicts with, coincides with, or supplements the federal regulatory scheme.

The Georgia statutory provisions are *a fortiori* invalid because they do in fact conflict with the federal statute, regulations, and standards. It was the purpose of Congress to erect a structure of uniform national standards for the classification of tobacco, which standards would be applied to individual lots by federal inspectors and the results communicated to interested persons in a prescribed manner. But Georgia has established a standard for Type 14 of flue-cured tobacco which conflicts with the federal standard and requires the communication of the state classification in a special manner. The inevitable—certainly, the probable—result of this conflict in standards and identification was, and would be, confusion, the very thing Congress sought to eliminate when it enacted the federal Tobacco Inspection Act.

ARGUMENT

THE CLASSIFICATION AND IDENTIFICATION PROVISIONS OF THE GEORGIA TOBACCO IDENTIFICATION ACT INVADE A FIELD PREEMPTED BY THE FEDERAL TOBACCO INSPECTION ACT AND CONFLICT WITH THE FEDERAL STATUTE AND IMPLEMENTING REGULATIONS

The federal Tobacco Inspection Act, and the standards and regulations promulgated thereunder, provide a comprehensive system of federal classification, inspection, and identification of tobacco sold through the warehouse-auction method. No question has been, or could be, raised concerning the validity of the federal classification scheme. The power of Congress to prescribe this scheme of regulation has been upheld by this Court in *Mulford* v. *Smith*, 307 U.S. 38, and *Currin* v. *Wallace*, 306 U.S. 1.

There is also no question that, if any provision of the Georgia Tobacco Inspection Act legislates in a field preempted by Congress, that provision must fail. See Appellants' Brief, p. 14. Appellants attempt only to show that there has been no congressional preemption of the area in which the provisions of the Georgia Act apply. This attack must fail for two related reasons: first, the Georgia Act covers classification and identification of tobacco sold in Georgia auction markets, concerning each of which subjects Congress has provided a comprehensive system of federal regulation; and, second, the Georgia legislation is in direct

conflict with the federal regulatory scheme. Congress has established a detailed federal program of grading and identification, and it is of the essence of such a program that there cannot be superimposed on it a different grading system with its own requirements.

A. THE PURPOSE OF THE FEDERAL TOBACCO INSPECTION ACT IS TO PROVIDE A SYSTEM OF UNIFORM NATIONAL STANDARDS FOR THE CLASSIFICATION OF TOBACCO, OF INSPECTION AND CLASSIFICATION BY AN IMPARTIAL FEDERAL INSPECTOR, AND A MEANS OF IDENTIFICATION OF THAT CLASSIFICATION

The federal Tobacco Inspection Act (App., *infra*, pp. 34–43) was enacted in 1935 to meet the need for uniform national standards of tobacco classification and impartial inspection of tobacco by a disinterested person in order to prevent what a supporter of the Act called a system of "wholesale robbery" of tobacco growers by tobacco buyers and speculators. 79 Cong. Rec. 11865. The Act itself states its purpose. Congress found that the classification of tobacco "according to type, grade, and other characteristics" affects the prices received; that "without *uniform* standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control" and "unreasonable fluctuations in prices and quality determinations occur," constituting a burden upon interstate commerce. Section 2, 7 U.S.C. 511a. (Emphasis added.) Consequently, Congress found it "imperative" that "*uniform* standards of classification and inspection" be used. *Ibid.* (Emphasis added.)

The market practices which led to the Act are described at length in the report of the House Com-

mittee on Agriculture, H. Rept. No. 1102, 74th Cong., 1st Sess., and in the debates on the floor of the House. The tobacco, after being sorted by the grower in accordance with whatever criteria he himself devised, was brought to the auction warehouse where it was put in baskets, weighed, and placed in rows on the floor. It was then sold at auction on a commission basis by the warehouseman acting as the representative of the tobacco grower. The sales were made without any prior determination of the grade of each basket of tobacco and without the grower having any knowledge of the amounts that lots of similar tobacco were bringing. The selling was at a rapid rate, some 7 to 10 seconds being spent on each basket of tobacco. Although the purchasers (representatives of tobacco companies and individual speculators) were experts in the typing and grading of tobacco, the farmer was considered by Congress to be incapable of familiarizing himself with the 100 or more grades of each type of tobacco and keeping himself informed as to current market prices. The House Committee concluded that "the possession of grade and price information by the buyers, and the lack of it on the part of the growers, places the growers under a severe handicap in the marketing of their tobacco and opens the way to abuses and practices by which farmers are victimized. * * * It is the thought of the committee that if the purchaser needs an expert in grades in order to protect his interest in the sale the growers should be accorded the same protection." [14]

[14] H. Rept. No. 1102, 74th Cong., 1st Sess., p. 2. See 79 Cong. Rec. 11865, 11866, 11868–70. The market practices relative to

On the floor of the House, Congressman Hancock, after describing the market practices and explaining that these practices encouraged snap judgments on the part of both buyers and sellers and left farmers at the mercy of buyers and speculators, concluded that the bill (which became the federal Tobacco Inspection Act) would "ameliorate some of [these] adverse conditions." It would do so, he stated, by furnishing, first, an inspection service by which tobacco offered for sale would be inspected by competent government inspectors and "graded according to United States standards of quality" and, second, a market news service which would furnish current market prices for each grade of tobacco. "[T]hese two services, inspection and market news, penetrate to the very heart of the deficiencies of the auction marketing system. For whereas under existing conditions the grower is without criteria as to either the quality or the value of his tobacco, these services furnish him impartial, disinterested information on both grade and value." 79 Cong. Rec. 11869–70. Representative Mitchell later emphasized that "[t]obacco inspection will bring about a more uniform class for tobacco of like quality and classification," and spoke of the advantages of having a "standard grade" for the classification of tobacco. 79 Cong. Rec. 11878.

The Senate Agriculture Committee agreed with these views. In its report, the Committee adopted as

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tobacco in general and to the auction system in particular have been fully described by this Court in *Mulford* v. *Smith*, 307 U.S. 38, 47–50; *Currin* v. *Wallace*, 306 U.S. 1, 7–8; *Townsend* v. *Yeomans*, 301 U.S. 441, 445; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 800.

its own, and reprinted, the statement made on the bill by the Department of Agriculture. This statement declared that the "first main objective of this bill is to furnish tobacco growers dependable information as to the quality of their tobacco according to *uniform standards.* * * * The bill would authorize the Secretary of Agriculture to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, *and the standards so established would be the official standards of the United States for such purpose.*" S. Rept. No. 1211, 74th Cong., 1st Sess., p. 1. (Emphasis added.)

The opponents of the bill, on the other hand, maintained that there was no need for national uniform standards of tobacco classification. Representative Harlan, for example, declared, "[i]t is purely a local question because the growth of tobacco in this country is spotty." The different kinds of tobacco grown in different places "are no more alike than cabbage and cauliflower. There is no similarity in the grading problems. There is no need of a national grade system. It is purely a local problem. It is unlike grading wheat or cotton, which are uniform crops. Now, if it is advisable to make this grading compulsory, then it ought to be done by the States, and not by the Federal Government." 79 Cong. Rec. 11882. Congress was also informed that tobacco grading statutes had been enacted by at least two of the states. 79 Cong. Rec. 11867, 11879. But it is plain that, in enacting the federal Tobacco Inspection Act and by specifying that the Secretary of Agriculture shall

establish uniform standards for tobacco classification, Congress rejected the argument that this matter should be handled by the states so that the standards would vary with the peculiarities of local conditions or of local views.

B. THE STANDARDS AND REGULATIONS PROMULGATED UNDER THE FEDERAL TOBACCO INSPECTION ACT CREATE FOR TOBACCO AUCTION MARKETS A COMPREHENSIVE SYSTEM OF FEDERAL TOBACCO CLASSIFICATION AND IDENTIFICATION BASED ON CHARACTERISTICS OF TOBACCO AND NOT ON GEOGRAPHIC ORIGIN

1. (*a*) To achieve its purpose of uniformity, Congress authorized the Secretary of Agriculture "to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States" (Section 3, 7 U.S.C. 511b). And, as we have seen, *supra*, pp. 5–8, the Secretary has promulgated comprehensive standards in accordance with this congressional authorization and with that of the Tobacco Stocks and Standards Act.[15] These standards divide domestic leaf tobacco into 7 classes and 27 types, each of which has 4 or more groups and several dozen grades.[16] Furthermore, Congress provided that these standards should be used for the classification of all tobacco sold on each auction market designated by the Secretary upon the affirmative vote of two-thirds of the growers who sell their to-

[15] Section 2, 45 Stat. 1079, as amended, 7 U.S.C. 502.

[16] 7 C.F.R. 30.31–30.42. As the Tobacco Inspection Act applies only to tobacco that is marketed through the auction warehouse system, its provisions currently apply only to 5 classes and 12 types of tobacco. 7 C.F.R. 29.1001–29.3407. The terms class, type, group, and grade are defined at pp. 5–6, *supra*.

bacco on that market." This classification is to be accomplished by the "authorized representative" of the Secretary, and the federal inspector is the "authorized representative." See the Statement, *supra*, pp. 5, 7.

The regulations establish "flue-cured tobacco" as one class and within that class specify 4 separate types, each of which has 7 groups and 172 possible grades.[17] One of these types, Type 14, is defined as (7 C.F.R. 29.1100):

> That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama.

Tobacco is classified within this type *no matter where it is grown*, for, the regulations also require "[t]obacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination of the tobacco" (7 C.F.R. 29.1096).

(*b*) When Congress enacted the federal Tobacco Inspection Act, it was aware that the Secretary of Agriculture had already established a set of stand-

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[17] Section 5 of the federal Tobacco Inspection Act, 49 Stat. 732, 7 U.S.C. 511d (App., *infra*, pp. 36–38). Since 1946 all flue-cured tobacco markets have been so designated. See U.S. Department of Agriculture, Agricultural Marketing Service Pamphlet 74, issued May 1960, p. 3.

[18] 7 C.F.R. 29.1001–1225, 29.1097–1100. See U.S. Department of Agriculture, Agricultural Marketing Service, Marketing Division, Pamphlet 74, issued May 1960, pp. 4, 10, 12–13.

ards for tobacco classification,"[30] under the United States Warehouse Act[31] and the Tobacco Stocks and Standards Act.[32] The standards, first issued in 1926, provided for a U.S. Type 14 flue-cured tobacco in substantially the same terms as that now found for Type 14 in 7 C.F.R. 29.1100, *supra*.[33] In addition, the Department of Agriculture pamphlet[34] announcing the 1926 standards explained why geographic information is given in defining the various types of tobacco:

> It is not possible, without going into considerable detail, to specify all of the sections in which a type is produced or to include all of the names by which a type is known in the trade at the present time. In the present classification it has been the purpose of the department to use a sufficient number of names to identify each type of tobacco. To supplement this information the principal sections in which each type is produced are also shown.

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[30] H. Rept. No. 1102, 74th Cong., 1st Sess., p. 5; S. Rept. No. 1211, 74th Cong., 1st Sess., p. 2.

[31] Section 19, 39 Stat. 489, 7 U.S.C. 257, authorizes the Secretary of Agriculture "to establish and promulgate standards for agricultural products by which their quality or value may be judged or determined."

[32] Section 2, 45 Stat. 1070, as amended, 7 U.S.C. 502.

[33] U.S. Type 14 was defined as "[t]hat type of flue-cured tobacco commonly known as Southern Flue-cured, Southern Bright, New Belt of Georgia and Florida, Southern District Bright, Southern District Yellow Leaf, Florida Bright, Alabama Bright, or Florida Flue-cured; produced principally in the southern section of Georgia, and extending into Florida and Alabama." Department of Agriculture, Bureau of Agricultural Economics, Misc. Civ. 55, "Type Classification of American-Grown Tobacco," issued January 1926, p. 3.

[34] See note 22, *supra*.

> In case the local name of a type or the section in which it is produced is not covered under the description of the type, it does not follow that the tobacco is of a different type. The following rule will assist in determining the type in which any tobacco should be placed: "Any tobacco having the same characteristics and corresponding qualities, colors and lengths is treated as one type, regardless of any factors of historical or geographical nature which can not be determined by an examination of the tobacco." [30]

These standards, known to Congress in 1935,[31] were the basis of the standards subsequently promulgated by the Secretary under the federal Tobacco Inspection Act.

(*c*) It is thus clear that Congress has provided, and the Secretary of Agriculture has implemented, a full program of uniform tobacco classification, now mandatory in all flue-cured tobacco markets. It is also clear that the standards established by the Secretary are not based on geographic origin; rather, they are based on

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[30] *Id.*, at 1-2. The standards were revised and reissued in 1939. Type 14 was again included in substantially the same form. Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements No. 118, "Classification of Leaf Tobacco Covering Classes, Types, and Groups of Grades," issued November 1939, p. 4, 7 C.F.R. 30.26(d). Once again, there was included a rule that all tobacco of like characteristics should be identically typed regardless of geographical origin. *Id.*, at 2, see 7 C.F.R. 30.6. It was explained that, "[a]s in the original classification, no attempt has been made to give all of the various names by which a type may be locally known or all of the sections in which it is produced." *Id.*, at 1.

[31] See note 19, *supra*, p. 22.

characteristics of tobacco which, in the Secretary's view, justify their categorization into various types. Tobacco that meets the characteristics of one specific type is includable in that type regardless of where it might have been grown. Appellants' contention to the contrary (Br., pp. 6, 11) ignores the force and effect of 7 C.F.R. 29.1036, *supra*, p. 21, which in plain language and purpose requires the typing of tobacco to be on the basis of characteristics and not of geography.

2. In addition to the establishment of uniform tobacco classification standards and the requirement of inspection to ascertain where a particular lot of tobacco fits within that classification structure, the federal Act provides for the communication of the results of the inspection to both the seller and the potential buyer of tobacco. As the House report makes clear, knowledge of the assigned classification would aid the buyer in determining whether and how much to bid on a certain lot of tobacco and the seller in determining whether to accept or reject that bid."

Specifically, the Act provides that the tobacco classification shall be certified by the federal inspector on an inspection certificate." And the Secretary, in the regulations, has directed that the classification be placed on the inspection certificate and announced by the warehouseman or his representative at the time the lot is offered in the auction."

3. In sum, Congress intended to and did establish a comprehensive system of uniform national standards

" H. Rept. No. 1162, 74th Cong., 1st Sess., p. 2.
" Sections 5, 7, 8, 7 U.S.C. 511d, f, g.
" 7 C.F.R. 29.68(b), 29.79, 29.80, 29.1144.

for tobacco classification based on tobacco characteristics, of inspection and classification of individual lots of tobacco by impartial disinterested federal inspectors, and of identification of this classification to the buyer or seller. In so doing, Congress considered the argument that these matters should be left to the states and rejected it. The Secretary of Agriculture, the official to whom Congress has delegated authority in this matter, has exercised that authority to the extent and in the manner which he deems appropriate. There is no challenge to his authority or to the requirements he has imposed. A full federal grading and identification system is in existence.

C. THE CLASSIFICATION AND IDENTIFICATION PROVISIONS OF THE GEORGIA TOBACCO IDENTIFICATION ACT LIE IN THE SAME FIELD AS, AND ARE IN CONFLICT WITH, THE CLASSIFICATION AND IDENTIFICATION PROVISIONS OF THE FEDERAL TOBACCO INSPECTION ACT

1. Through its Tobacco Identification Act (App., *infra*, pp. 44–59) the State of Georgia has legislated in an area in which, as we have shown, Congress has acted to establish a uniform national system for classifying tobacco. In this legislation Georgia has attempted to establish its own divergent standard for Type 14 flue-cured tobacco and its own method of identification.

The Georgia statute defines Type 14 tobacco as "that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama." Section 1, *infra*, pp. 9, 45–46. The statute goes on to make clear that the one criterion to differentiate Type 14 from "other types" is its "origin," *the place of production*. Sections 13 (A),

(B), (C), *infra*, pp. 51–52. And so it has been interpreted and applied in practice. If the tobacco is grown in Georgia, Florida, or Alabama, it falls within Type 14 as defined by the Georgia Act, but if it is grown in the Carolinas or Virginia it is outside the Georgia standards for Type 14 (R. 67–69)."

The definition of Type 14 tobacco in Section 1 of the Georgia Act is ignored by appellants when they contend (Brief, p. 12) that the Act does no more than require "proper identification" of tobacco sold in Georgia. To the contrary, as we have seen, *supra*, pp. 9, 10–11, 20–26, the Georgia Act not only attempts to define Type 14 tobacco, but does so by establishing standards different from those determining whether tobacco is Type 14 under the federal Act. Whereas the federal classification system defines the various types of tobacco in accordance with their characteristics (see pp. 20–23, *supra*), Georgia defines Type 14 merely on the basis of geography. And, as the record demonstrates (R. 62, 68, 77), the result during the two days in which the Georgia Act operated was that the same tobacco was classified Type 14 under federal standards and another type under Georgia standards. The result was the very opposite of the uniformity and certainty that Congress intended.

2. If it be assumed, however, as appellants contend (Brief, p. 12), that the challenged provisions

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"The court below found, in its opinion (R. 160), that "The testimony of the defendants established that, in fact, tobaccos having the same characteristics and corresponding qualities, colors and lengths may be grown on both sides of the boundary line between Georgia and South Carolina."

of the Georgia Act provide for no more than identification of the federal type of tobacco being sold. appellants' cause is not aided. For, as we have demonstrated, pp. 5, 24–25, *supra*, an integral part of the federal tobacco classification scheme is the identification of the type and grade of tobacco in the form both of an inspection certificate and of an oral announcement at the time of the sale. The Georgia identification provisions, at the very least, duplicate the means of identification that Congress and the Secretary of Agriculture deem appropriate. In actual fact, by requiring the designation of the classification of the tobacco pursuant to standards different than those promulgated by the Secretary, the Georgia identification provisions result in confusion on the market floor and are subversive of the very purposes that prompted the enactment of the federal statute. The objectives of any uniform system of grading and identification require that it stand alone, unconfused by another system of grading, whether it be parallel or inconsistent.

D. SINCE THE CLASSIFICATION AND IDENTIFICATION PROVISIONS OF THE GEORGIA ACT REGULATE THE SAME FIELDS AS THE FEDERAL TOBACCO INSPECTION ACT, AND CONFLICT WITH THE REGULATORY SCHEME ESTABLISHED UNDER THAT ACT, THEY ARE INVALID

1. The legal principles controlling on the question of the validity of state legislation in an area preempted by Congress in a comprehensive regulatory scheme need no extensive discussion. It is well settled that, whenever federal regulation is so pervasive as to manifest a congressional intent to occupy the field of regulation, state regulation with respect to the same

subject matter is precluded. See, for example, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504; *Guss* v. *Utah Labor Bd.*, 353 U.S. 1, 2–12; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480–81; *Bethlehem Steel Co.* v. *New York State Board*, 330 U.S. 767, 773–77. The power of Congress to legislate in an area in such a manner as to exclude state action is not limited to situations in which national uniformity is so essential that, lacking congressional permission, all state action is invalid notwithstanding a complete absence of federal regulation. *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148, 154–55. And it is immaterial that Congress chose to delegate to an administrator the task of drawing up the detailed regulations. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605; *Bethlehem Steel Co.* v. *New York State Board*, *supra*, at 773–774.

Congress need not declare explicity that it is preempting an area to the exclusion of the states. If the scheme of federal legislation indicates that Congress left no room for the states to supplement it, then any state legislation in that field is precluded by the federal legislation. *Rice* v. *Santa Fe Elecator Corp.*, 331 U.S. 218, 230. "It long has been the rule that exclusion of state action may be implied from the nature of the [federal] legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel Co.* v. *New York State Board*, *supra*, at 772. See also *International Union* v. *Wisconsin Board*, 336 U.S. 245, 253; *Welch Co. v.* New *Hampshire*, 306 U.S. 79, 85; *Pennsylvania R. Co.* v. *Public*

Serv. Commn., 250 U.S. 566, 569; *Reid* v. *Colorado*, 187 U.S. 137, 148.

Furthermore, there need be no direct conflict between the federal and state legislation. When "Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. *Charleston & W. Car. R.R.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604. Where congressional legislation occupies the field, a state statute "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." *Missouri Pacific* v. *Porter*, 273 U.S. 341, 346. "[C]oincidence is as fatal as conflict when Congress acts." *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 543. And even coincidence is not necessary, for the states may not even supplement the federal regulation. *Pennsylvania R. Co.* v. *Pulic Serv. Commn.*, 250 U.S. 566, 569; *Kelley* v. *Washington*, 302 U.S. 1, 9; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605; *Erie R. Co.* v. *New York*, 223 U.S. 671, 683.

2. We have shown that in the federal Tobacco Inspection Act Congress authorized the establishment, on a mandatory basis, of uniform national standards for the classification of tobacco sold by means of warehouse auctions. *Supra*, pp. 4–5, 16–24. In addition, Congress directed the inspection of the tobacco by independent federal inspectors who were charged with classifying the tobacco in accordance with the federal

standards. *Supra,* pp. 5, 7, 20–21. Congress also provided for the identification of this classification for the guidance of both seller and buyer. *Supra,* pp. 5, 24. Though Congress authorized this uniform national program of tobacco classification, inspection, and identification, and laid down its guidelines, it left to the Secretary of Agriculture the task of implementing it through detailed regulations; this the Secretary has done. *Supra,* pp. 5–7, 20–21. Congress established this program of federal classification, inspection, and identification of tobacco in response to a felt need for uniformity. It left no room for the states to act on these matters, though it did not legislate a program of complete regulation of the auction market. See *Townsend* v. *Yeomans,* 301 U.S. 441.

We have also shown that in its state Tobacco Identification Act, Georgia has created its own standards to differentiate Type 14 flue-cured tobacco from other types—so as to discriminate against certain out-of-state tobaccos included within the federal Type 14—and has prescribed its own method of identifying tobacco sold in its auction markets. Even if it be assumed, contrary to the fact, that the Georgia definition of Type 14 tobacco is coincident with the federal, and that Georgia is doing no more than assisting the Secretary of Agriculture in seeing that the tobacco is properly identified as to type, the Georgia statute cannot stand under the established principles of federal preemption.

3. The provisions of the Georgia statute with which we are concerned are invalid for the additional reason that they *are* directly repugnant to the federal

regulations.[20] We have pointed out (*supra*, pp. 20–24) that under the federal standards types of tobacco are classified in accordance with characteristics of the tobacco and not by place of origin. We have also seen (*supra*, pp. 25–26) that under the Georgia statutory standards Type 14 tobacco is differentiated from other types of flue-cured tobacco solely on the basis of place of origin. Thus, the same tobacco was and could be classified under the federal standards as Type 14 and under the Georgia standard as other than Type 14. And while the federal identification apparatus identified the tobacco as Type 14, that put into motion by Georgia identified it as another. Plainly, this situation is the direct opposite of the certainty and uniformity that Congress intended.

4. The significance of the question of preemption in this case is not limited to the typing of tobacco. If Georgia is able validly to establish its own standards for the typing of tobacco and the identification of that type, there appears to be no impediment to its valid establishment of its own standards for the seven classes of domestic tobacco and the upwards of two hundred grades within each class. The same process could be followed by each of the other states in which tobacco is grown or marketed. The result clearly would be a renewal of the confusion that Congress desired to eradicate.[21]

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[20] See, *e.g.*, *Currin* v. *Wallace*, 306 U.S. 1, 12; *Turner* v. *Maryland*, 107 U.S. 38, 57–58.

[21] The road will also be open for the re-creation of the chaotic conditions in the classification of all agricultural products that, since 1911, Congress has attempted to eliminate. See, *e.g.*, United States Warehouse Act, Sections 18, 19, 39 Stat.

5. Finally, it should be noted that, if any element of the Georgia tobacco industry is dissatisfied with the implementation of the federal Tobacco Inspection Act, it can have recourse to the Secretary, the agent to whom Congress has delegated the duty of implementing the Act with appropriate standards and regulations. If there be dissatisfaction with the standards as they now read, including the provisions that types of tobacco shall be differentiated not on the basis of geography but rather on the basis of the characteristics of the tobacco, or if there be dissatisfaction with the method of identification of type prescribed by the Secretary, a petition may be filed for the institution of a rule-making proceeding. 7 C.F.R. 1.27, 1.28; see Section 4 of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. 1003(d). If, on the other hand, there is dissatisfaction with the way that federal inspectors are carrying out or failing to carry out their obligation under the Secretary's standards and regulations, an appeal of the disputed classification can be made to the inspector's supervisor and from there to the Director of the Tobacco Division, Agricultural Marketing Service, Department of Agriculture. 7 C.F.R. 29.90, 29.91.

488, 489, as amended, 7 U.S.C. 257, 260; United States Grain Standards Act, Sections 2, 4, 39 Stat. 482, 483, as amended, 7 U.S.C. 74, 76; Export Apples and Pears Act, Section 1, 48 Stat. 123, 7 U.S.C. 581; Export Grapes and Plums Act, Section 1, 74 Stat. 734, 7 U.S.C. (Supp. II) 591; Act of August 28, 1954, Section 401(e), 68 Stat. 907, as amended, 7 U.S.C. 608e-1; Cotton Futures Act, 39 Stat. 476, as codified, 26 U.S.C. 4863(a)(7). Cf. *Currin v. Wallace*, 306 U.S. 1, 12.

The Secretary of Agriculture has authorized us to advise the Court that, though the Secretary has from time to time revised his standards and regulations in accordance with experience and changing conditions,[23] no one has petitioned for a rule-making proceeding concerning the matters on which Georgia has legislated and no one has exercised the right to appeal to the Director of the Tobacco Division from an inspector's classification of flue-cured tobacco.

CONCLUSION

For these reasons, it is submitted that the judgment below should be affirmed.

Respectfully submitted.

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[23] *E.g.*, 12 Fed. Reg. 8041; 17 Fed. Reg. 6610; 22 Fed. Reg. 3747; 23 Fed. Reg. 2668; 24 Fed. Reg. 3978.

APPENDIX

The Federal Tobacco Inspection Act of August 23, 1935, 49 Stat. 731, 7 U.S.C. 511, provides as follows (as it appears in the United States Code):

§ 511. *Definitions.*

When used in this chapter—

(a) "Person" includes partnerships, associations, and corporations, as well as individuals.

(b) "Secretary" means the Secretary of Agriculture of the United States.

(c) "Inspector" means any person employed, licensed, or authorized by the Secretary to determine and certify the type, grade, condition, or other characteristics of tobacco.

(d) "Sampler" means any person, employed, licensed, or authorized by the Secretary to select, tag, and seal official samples of tobacco.

(e) "Weigher" means any person employed, licensed, or authorized by the Secretary to weigh and certify the weight of tobacco.

(f) "Tobacco" means tobacco in its unmanufactured form.

(g) "Auction market" means a market or place to which tobacco is delivered by the producers thereof, or their agents, for sale at auction through a warehouseman or commission merchant.

(h) Words in the singular form shall be deemed to import the plural form when necessary.

(i) "Commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession,

or the District of Columbia. For the purposes of this chapter (but not in any wise limiting the foregoing definition) a transaction in respect to tobacco shall be considered to be in commerce if such tobacco is part of that current of commerce usual in the tobacco industry whereby tobacco or products manufactured therefrom are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Tobacco normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possessions of the United States, and foreign nations. (Aug. 23, 1935, ch. 623, § 1, 49 Stat. 731.)

§ 511a. *Declaration of purpose.*—Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; that such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute

a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein. (Aug. 23, 1935, ch. 623, § 2, 49 Stat. 731.)

§ 511b. *Official standards for classification; tentative standards; modification.*—The Secretary is authorized to investigate the sorting, handling, conditioning, inspection, and marketing of tobacco from time to time, and to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States, and shall become effective immediately or upon a date specified by the Secretary: *Provided,* That the Secretary may issue tentative standards for tobacco prior to the establishment of official standards therefor, and he may modify any standards established under authority of this chapter whenever, in his judgment, such action is advisable. (Aug. 23, 1935, ch. 623, § 3, 49 Stat. 732.)

§ 511c. *Same; demonstration; samples; cost.*—The Secretary is authorized to demonstrate the official standards; to prepare and distribute, upon request, samples, illustrations, or sets thereof; and to make reasonable charges therefor: *Provided,* That in no event shall charges be in excess of the cost of said samples, illustrations, and services so rendered. (Aug. 23, 1935, ch. 623, § 4, 49 Stat. 732.)

§ 511d. *Designation of markets; manner.*—The Secretary is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce. Before any market is designated by the Secretary under this section he shall determine by referendum the desire of tobacco growers who sold tobacco at auction on such market during

the preceding marketing season. The Secretary may at his discretion hold one referendum for two or more markets or for all markets in a type area. No market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting favor it. The Secretary shall have access to the tobacco records of the Collector of Internal Revenue and of the several collectors of internal revenue for the purpose of obtaining the names and addresses of growers who sold tobacco on any auction market, and the Secretary shall determine from said records the eligibility of such grower to vote in such referendum, and no grower shall be eligible to vote in more than one referendum. After public notice of not less than thirty days that any auction market has been so designated by the Secretary, no tobacco shall be offered for sale at auction on such market until it shall have been inspected and certified by an authorized representative of the Secretary according to the standards established under this chapter, except that the Secretary may temporarily suspend the requirement of inspection and certification at any designated market whenever he finds it impracticable to provide for such inspection and certification because competent inspectors are not obtainable or because the quantity of tobacco available for inspection is insufficient to justify the cost of such service: *Provided,* That, in the event competent inspectors are not available, or for other reasons, the Secretary is unable to provide for such inspection and certification at all auction markets within a type area, he shall first designate those auction markets where the greatest number of growers may be served with the facilities available to him. No fee or charge shall be imposed or collected for inspection or certification under this section at any designated auction market. Nothing contained in this chapter shall be construed to prevent transactions in tobacco at markets not designated by

the Secretary or at designated markets where the Secretary has suspended the requirement of inspection or to authorise the Secretary to close any market. (Aug. 23, 1935, ch. 623, § 5, 49 Stat. 732.)

§ 511e. *Sampling and weighing; cost; disposition of moneys received; expenses; purpose.*—The Secretary, independently or in cooperation with other branches of the Government, State agencies, or persons, whether operating in one or more jurisdictions, is authorised to employ and/or license competent persons as samplers to take official samples of tobacco, or as weighers to weigh and certify the weight of tobacco, or as inspectors of tobacco to determine and certify, upon the request of the owner or other financially interested person, the type, grade, weight, condition, and/or such other facts as the Secretary may deem necessary.

The Secretary is authorized to fix and collect such fees or charges in the administration of this section as he may deem reasonable, and the moneys collected, except as provided in this section, shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts. Fees or charges collected under an agreement with a State, municipality, or person, or by an individual licensed to inspect or weigh or sample tobacco under this chapter, may be disposed of in accordance with the terms of such agreement or license. Charges for expenses for travel and subsistence incurred by inspectors or weighers or samplers employed by the Secretary when required to be paid by the applicant for service, may be credited to the appropriation, or any other funds authorised in this chapter from which they were paid.

This section is intended merely to provide for the furnishing of services upon request of the owner or other person financially inter-

ested in tobacco to be sampled, inspected, or weighed and shall not be construed otherwise. (Aug. 23, 1935, ch. 623, § 6, 49 Stat. 732.)

§ 511f. *Reinspection and appeal inspection; certificate as evidence.*—The Secretary shall provide for such reinspection or appeal inspection of tobacco as he may deem necessary for the confirmation or reversal of certificates issued under this chapter. Each inspection certificate issued under this chapter, unless invalidated or superseded in accordance with the regulations of the Secretary, shall be received in all courts and by all officers and employees of the United States as prima facie evidence of the truth of the statements therein contained. (Aug. 23, 1935, ch. 623, § 7, 49 Stat. 733.)

§ 511g. *Placing of grade on warehouse tickets, etc.; form.*—Warehousemen shall provide space on warehouse tickets or other tags or labels used by them for showing the grade of the lot covered thereby as determined by an authorized tobacco inspector under this chapter. The Secretary may prescribe, by regulation, the form in which such certification of grade shall be shown, and may require that a copy of such warehouse ticket, tag, or label shall be furnished to the Secretary. (Aug. 23, 1935, ch. 623, § 8, 49 Stat. 733.)

§ 511h. *Publication of information relating to tobacco.*—The Secretary is authorized to collect, publish, and distribute, by telegraph, mail, or otherwise without cost to the grower, timely information on the market supply and demand, location, disposition, quality, condition, and market prices for tobacco. (Aug. 23, 1935, ch. 623, § 9, 49 Stat. 733.)

§ 511i. *Offenses.*—It shall be unlawful—

(a) For any person to use the words "United States", "Government", or "Federal", or any abbreviation thereof, in, or in connection with, any statement relating to the

grade of tobacco when such grade is not, in fact, one of the grades for tobacco according to the standards of the United States.

(b) For any person falsely to make, issue, alter, forge, or counterfeit, or aid, cause, procure, or assist in or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate, stamp, tag, seal, label, or other writing purporting to be issued or authorized under this chapter.

(c) For any person, not an authorized inspector under this chapter, to issue a certificate or report stating the type, grade, size, or condition of any lot of tobacco to be in accordance with the standards of the United States therefor which is of such color, size, arrangement, or wording as to be mistaken for a certificate issued under this chapter, unless such certificate states in prominent letters in its heading that it is not issued under authority of the United States.

(d) For any person employed, designated, or licensed by the Secretary as an inspector, sampler, or weigher of tobacco under this chapter knowingly to inspect, sample, or weigh improperly, or to issue any false certificate under this chapter, or to accept money or other consideration, directly or indirectly, for any neglect or improper performance of duty as an inspector, sampler, or weigher.

(e) For any person improperly to influence or to attempt improperly to influence or forcibly to assault, resist, impede, or interfere with any inspector, sampler, weigher, or other person employed, designated, or licensed by the Secretary in the execution of his duties under this chapter: *Provided, however,* That nothing herein shall operate to prevent the owner of tobacco from appealing or protesting, in accordance with regulations of the Secretary, the grade certified for his tobacco.

(f) For any person falsely to represent or otherwise indicate that he is authorized by the Secretary to inspect, sample, or weigh tobacco under this chapter.

(g) For any person to substitute, or attempt to substitute, following inspection or sampling or weighing under this chapter, other tobacco for tobacco actually inspected or sampled or weighed, or in the case of tobacco inspected in auction warehouses for any person not so authorized by the Secretary to remove any certificate of grade from any lot of tobacco prior to the sale of such lot.

(h) For any person falsely to represent that tobacco has been inspected, sampled, or weighed under this chapter; or knowingly to have made any false representation concerning tobacco inspected under this chapter; or knowing that tobacco is to be offered for inspection or sampling under this chapter to load, pack, or arrange such tobacco in such manner as knowingly to conceal foreign matter or tobacco of inferior grade, quality, or condition; or for any person knowing that tobacco has been so loaded, packed, or arranged, to offer it for inspection or sampling without disclosing such knowledge to the inspector or sampler before inspection or sampling.

(i) For any person willfully to alter an official sample of tobacco by removing or plucking leaves or otherwise, or for any person knowing that an official sample of tobacco has been so altered, thereafter to represent such sample as an official sample. (Aug. 23, 1935, ch. 623 § 10, 49 Stat. 733.)

§ 511j. *Same; publication of facts.*—The Secretary is authorized to publish the facts regarding any violation of this chapter. (Aug. 23, 1935, ch. 623, § 11, 49 Stat. 734.)

§ 511k. *Same, penalty.*—Any person violating any provisions of sections 511d and 511i of this title shall be guilty of a misdemeanor and upon

conviction thereof shall be fined not more than $1,000, or imprisoned not more than one year, or both. (Aug. 23, 1935, ch. 623, § 12, 49 Stat. 734.)

§ 5111. *Act of agent as that of principal.*—In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by an association, partnership, corporation, or firm, within the scope of his employment or office, shall be deemed to be the act, omission, or failure of the association, partnership, corporation, or firm, as well as that of the person. (Aug. 23, 1935, ch. 623, § 13, 49 Stat. 734.)

§ 511m. *Regulation; hearings; employees; expenditures; appropriation.*—The Secretary is authorized to make such rules and regulations and hold such hearings as he may deem necessary to effectuate the purposes of this chapter and may cooperate with any other Department or agency of the Government; any State, territory, district, or possession, or department, agency, or political subdivision thereof; purchasing and consuming organizations, boards of trade, chambers of commerce, or other associations of business men or trade organizations; or any person, whether operating in one or more jurisdictions in carrying on the work herein authorized; and he shall have the power to appoint, suspend, remove, and fix the compensation of all officers, employees, and licensees not in conflict with existing law. The Secretary is authorized to make such expenditures for rent outside of the District of Columbia, printing, binding, telegrams, telephones, books of reference, publications, furniture, stationery, office and laboratory equipment, travel, tobacco for use in preparing and demonstrating standards, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this chapter in the District

of Columbia and elsewhere, and as may be appropriated for by Congress; and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for administering this chapter. (Aug. 23, 1935, ch. 623, § 14, 49 Stat. 734.

§ 511n. *Hearings; examination of witnesses; refusal to testify or produce evidence.*—In carrying on the work authorized in this chapter the Secretary, or any officer or employee designated by him for such purpose, shall have power to hold hearings, administer oaths, sign and issue subpenas, examine witnesses, and require the production of books, records, accounts, memoranda, and papers. Upon refusal by any person to appear, testify, or produce books, records, accounts, memoranda, and papers in response to a subpena, the proper United States district court shall have power to compel obedience thereto. (Aug. 23, 1935, ch. 623, § 15, 49 Stat. 735.)

§ 511o. *Separability of provisions.*—If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby. (Aug. 23, 1935, ch. 623, § 16, 49 Stat. 735.)

§ 511p. *Delegation of Duties by Secretary of Agriculture.*—Any duties devolving upon the Secretary of Agriculture by virtue of the provisions of this chapter may with like force and effect be executed by such officer or officers, agent or agents, of the Department of Agriculture as the Secretary may designate for the purpose. (Aug. 23, 1935, ch. 623, § 17, 49 Stat. 735.)

§ 511q. *Short title.*—This chapter may be cited as "The Tobacco Inspection Act." (Aug. 23, 1935, ch. 623, § 18, 49 Stat. 735.)

The Georgia Tobacco Identification Act of March 7, 1960, 1960 Ga. Law 214, provides as follows:

An Act to regulate the sale of flue-cured leaf tobacco in this State so as to enable producers to have an adequate time to properly cure, prepare, and market flue-cured leaf tobacco; to provide a means of identifying all types of flue-cured leaf tobacco sold in this State and a procedure connected therewith; to provide for the licensing and bonding of operators of flue-cured leaf tobacco and a procedure connected therewith and a license fee; to provide for the bonding of operators of tobacco warehouses, the amount thereof, and the conditions of such bond; to provide the maximum charges and expenses of handling and selling leaf tobacco in this State; to provide that statements of charges shall be submitted by the warehouseman to the seller of tobacco; to provide for records to be kept by licensee to show the origin and amount of tobacco sold by him and a procedure connected therewith; to provide for the duties of the Commissioner of Agriculture in compiling statistics relative to the sale of leaf tobacco; to create and advisory board and to provide its composition, the duties of the members thereof and their compensation; to provide for the setting of the opening date of the tobacco marketing season in this State and to provide a procedure connected therewith; to provide a minimum tobacco marketing season in this State and a procedure for the ceasing of operations of a warehouse prior to the expiration of the maximum selling season; to provide the maximum rate of sales of leaf tobacco by warehousemen; to provide a means of identification of flue-cured leaf tobacco as to types sold in this State and a procedure connected therewith; to provide a penalty for violating the provisions of section 13 by a licensee; to provide for identification

tags for use in marketing tobacco in this state; to prohibit the mixing of type 14 tobacco with any other type of tobacco and to prescribe a means for the sale of such mixed tobacco; to provide for the registration of purchasers of tobacco for resale and a procedure connected therewith; to provide for the duties of Commissioner of Agriculture in conjunction with the administration and enforcement of this Act; to provide for certification by weighers for the weighing of tobacco at each warehouse and a procedure connected therewith; to provide for the revocation or suspension of any license or registration issued hereunder after notice and hearing and a procedure connected therewith; to provide for injunctions and a procedure connected therewith; to provide for rules and regulations; to provide for judicial review of administrative determinations or decisions and a procedure connected therewith; to provide for appeals and a procedure connected therewith; to provide for the impounding of records and commodities during investigation for violations of this Act and rules and regulations promulgated hereunder; to repeal Code Chapter 111-2 relating to statistics on leaf tobacco; to repeal an Act approved March 28, 1935 (Ga. L. 1935, p. 476), fixing a maximum charge for selling and handling leaf tobacco; to repeal an Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco; to define terms; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

INTENT

SECTION 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco

in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State of Georgia, Florida, and Alabama.

AUCTION LICENSES

SECTION 2. No person real or corporate shall operate, hold or conduct an auction sale for the sale of flue-cured leaf tobacco within this State without having first obtained a license for the year in which the sale is made from the Commissioner. The license shall be for the calendar year and the license fee shall be $10.00 per each calendar year and shall expire on December 31 of each year and be subject to renewal under such rules and regulations as the Commissioner shall prescribe.

SAME, BONDS

SECTION 3. As a prerequisite to the issuance of a license under the provisions of this Act, each applicant shall produce evidence to the Commissioner that he has in force for the calendar year for which license is sought a bond issued by a corporate entity authorized to do business in this State in the penal sum of $10,000.00. Such information shall show that the bond is in full force and effect and shall remain of full force and effect during the calendar year for which the license is sought. The bond shall be conditioned upon the licensee performing all the duties imposed upon him

by law and the accounting for the proceeds of all flue-cured leaf tobacco received by him for sale and sold by him.

CHARGES BY AUCTION WAREHOUSEMEN

SECTION 4. The maximum charges and expenses of handling and selling leaf tobacco by warehousemen licensed under this Act shall not exceed the following schedule, to-wit:

For auction fees, 15¢ on all piles or sheets of one hundred (100) pounds or less and twenty-five cents (25¢) on all piles or sheets over one hundred (100) pounds. For weighing and handling, ten cents (10¢) per pile or sheet for all piles or sheets of one hundred (100) pounds or less and ten cents (10¢) for each additional one hundred (100) pounds. For commissions on the gross sales of leaf tobacco in said warehouses not to exceed two and one-half per cent (2½%) of said gross sales.

SAME, STATEMENTS

SECTION 5. The licensee of each and every warehouse shall render to each seller of tobacco of his warehouse an itemized statement plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commission on each sale.

WAREHOUSE RECORDS, REPORTS, ETC.

SECTION 6. Each licensee shall keep a correct daily account of the number of pounds of leaf tobacco sold upon the floor of his warehouse. On or before Monday of each week, the licensee shall make a statement under oath of all of the tobacco sold upon the floor of his warehouse during the preceding week and shall transmit each report to the Commissioner. The report shall be so arranged and classified as to show

the number of pounds of tobacco sold for producers, the number of pounds sold for dealers, and the number of pounds resold by the licensee for his own account or for the account of some other warehouse or licensee. In addition thereto each licensee shall indicate the number of pounds of type 14 flue-cured leaf tobacco sold upon the floor of his warehouse for producers thereof and the number of pounds of type 14 flue-curred leaf tobacco sold by persons other than producers upon the floor of his warehouse. The licensee shall report the total number of pounds of other than type 14 flue-curred leaf tobacco sold for producers and persons other than producers. In addition thereto, each licensee shall make such additional reports as shall be prescribed by the Commissioner.

RECORDS BY COMMISSIONER OF AGRICULTURE

SECTION 7. The Commissioner shall cause to be kept and compiled the information submitted to him as to the sales of tobacco in this State. He shall cause such records to be kept in a manner so as to show the number of pounds of type 14 tobacco sold by each warehouse as well as the number of pounds of other than type 14 tobacco sold by each warehouse. He shall cause such records to be kept in a manner so as to show separately the number of pounds of type 14 tobacco and other types sold by producers and the number of pounds of each type of tobacco resold. The Commissioner of Agriculture is authorized to cause such information to be published in a manner that he deems most beneficial.

ADVISORY BOARD

SECTION 8. To aid in the administration of this Act, there is hereby created an Advisory Board to be composed of nine (9) members. Three (3) members are to be members of the House of Representatives to be appointed by

the Speaker of the House, and two (2) members are to be members of the Senate to be appointed by the President of the Senate. The members of the General Assembly shall be appointed from those members who are tobacco producers or in the absence of such producers in the General Assembly such members may be appointed from the members of the General Assembly who represent the flue-cured leaf tobacco producing counties and districts of this State. One (1) member shall be the Commissioner of Agriculture, ex officio, or his representative, who shall be Chairman of the Board. One (1) member shall be a flue-cured leaf tobacco producer to be appointed by the Commissioner of Agriculture. One (1) member shall be the President of the Georgia Farm Bureau Federation, or his representative. One (1) member shall be a member of the Georgia Flue-Cured Tobacco Warehousemen's Association to be appointed by the President of that Association. The appointive members shall serve at the pleasure of the appointing officer. The members of the General Assembly shall receive the per diem and expense allowance provided for committee work of the General Assembly and such sums shall be paid from the funds appropriated for the operation of the General Assembly. The other appointive members of the Board shall be compensated in the amount of $15.00 per day for each day in attendance of the duties of the Board and shall be reimbursed for the necessary expenses incurred in the performance of their duties from the funds of the Department of Agriculture. The Commissioner shall be reimbursed for his expenses incurred in the performance of his duties. The members of the Board shall not receive the per diem provided herein for more than seven (7) days per year.

SAME, MEETINGS, ETC.

SECTION 9. The Board shall meet in June of each year, or upon call of the Chairman, to survey the condition of the tobacco crop and recommend an opening date of the marketing season. The Chairman shall determine the time and place of the meeting. The Board shall recommend to the Commissioner a date for the opening of the tobacco marketing season. If the Commissioner approves the opening date or if he deems it necessary for any other reason, he shall cause one or more members of the Board to attend the meeting of the Board of Governors of the Bright Belt Warehouse Association or its successors to make known the recommendation as to the opening of the marketing season in Georgia. If the Board of Governors of the Bright Belt Warehouse Association shall disapprove the recommended date or shall indicate an opening date for the tobacco marketing season in Georgia that is not in accordance with nor agreeable to the Tobacco Advisory Board or the Commissioner, the Commissioner shall determine the opening date of the tobacco marketing season in this State. If any licensee shall hold a sale prior to the date determined by the Commissioner, the license of the licensee shall stand revoked and shall not be reinstated or reissued in the calendar year of the revocation. The revocation provided herein shall be in addition to the other penalties provided for the violation of this Act. It is the intent and purpose of this section to provide a procedure for the fixing of the opening date of the tobacco marketing season and to place the final authority to fix said date in the Commissioner of Agriculture.

MARKETING SEASON

SECTION 10. The flue-cured leaf tobacco marketing season shall continue for a minimum of

twenty-seven (27) selling days after the opening date. The operating day of each flue-cured leaf tobacco warehouse shall not exceed five (5) actual selling hours and operating week of each such warehouse shall be limited to five (5) actual selling days, provided that no sale shall be held on Saturday or Sunday.

SAME

SECTION 11. If any warehouse has two (2) successive selling days during which the actual selling time is not more than one (1) hour each day, then that particular warehouse shall be permitted to cease its operations but not before two (2) days have passed after the days that the actual selling time has not exceeded one (1) hour per day. The Commissioner may authorize a warehouse to cease operations at an earlier date than that provided herein when the Commissioner determines that the ceasing of operations by the warehouse is in the best interest of the marketing of tobacco.

MAXIMUM SALES

SECTION 12. The maximum rate of sales at any such warehouse shall not exceed four hundred fifty (450) baskets during any one (1) hour nor shall the rate of sales during any one (1) day or week exceed four hundred and fifty (450) baskets per hour.

TAGS FOR TYPE 14 TOBACCO

SECTION 13. (A) As an aid in providing positive identification of type 14 flue-cured leaf tobacco, it shall be the duty of each licensee to furnish white identification tags to identify type 14 tobacco. It shall be the duty of each licensee to cause such white identification tags to be placed upon each sheet of type 14 tobacco received in his warehouse for sale by requiring that producers, at the time of the receipt of

tobacco in the warehouse submit proof of the origin of the tobacco to be sold. No licensee shall receive from any producer any tobacco for sale unless the licensee receives proof in the form of marketing cards, or other identification measures issued by the United States Department of Agriculture so as to definitely establish the origin of the tobacco. The licensee shall cause to be placed upon each sheet of type 14 tobacco a white sheet ticket that shall remain upon the sheet of tobacco at all times after receipt in the warehouse until after the sale of the sheet of tobacco and shall cause such ticket to have a carbon copy of the same color that shall remain with the sheet of tobacco at all times subsequent to sale, as well as prior to the sale, that the tobacco remains in this State.

(B) Each licensee shall cause to be placed upon each sheet of other than type 14 tobacco received by him for sale, at the time of the receipt thereof, a colored identification tag of a color prescribed by the Commissioner that shall be attached to and shall remain in a conspicuous place at or near the top of the sheet of tobacco in such manner as to show to any person who desires to ascertain the type of tobacco offered for sale, or held for sale, that the tobacco is other than type 14. It shall be the duty of each licensee to ascertain at the time of the receipt of the tobacco to ascertain from producers or others the origin of the tobacco offered for receipt and to place the appropriate tag upon the tobacco so as to indicate the type.

(C) Each licensee receiving tobacco from persons other than producers for sale shall require that the origin of the tobacco be proven to his satisfaction so as to enable the licensee to properly identify the type of tobacco.

(D) Any licensee who shall indicate or permit to be indicated upon his premises any to-

bacco as type 14 when, in fact, such tobacco is not type 14 or any licensee who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment of not less than one year nor more than five years and shall be subject to a fine of not more than $5,000.00 or both such fine and imprisonment.

(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to indicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State.

IDENTIFICATION TAGS

SECTION 14. It shall be the duty of each licensee to provide identification tags of the color prescribed by the Commissioner for the use in marketing tobacco in his warehouse. Each licensee shall submit proof to the Commissioner prior to the opening of the marketing season, at a time prescribed by the Commissioner, of each year of an adequate supply of the identification tags required for the operation of his warehouse during the subsequent marketing season. Identification tags shall be of the size, color, number of carbon copies, shape and provide for information as shall be prescribed by the Commissioner.

RESALES OF TOBACCO

SECTION 15. Any person who shall purchase tobacco at auction for resale shall cause the tobacco so purchased to retain its identity as to type. Any person who shall mix type 14 tobacco with any other type of tobacco and who shall offer such mixed tobacco for sale shall cause such tobacco to be marketed and identified as other than type 14 tobacco. It shall

be the duty of each purchaser for resale to retain the original identification ticket of each sheet of tobacco so purchased or a copy thereof and submit such sheets to the warehouse as a means of identification when the tobacco is offered for resale.

SAME, LICENSING

SECTION 16. It shall be unlawful for any person to purchase tobacco for resale without having first registered with the Commissioner of Agriculture. There shall be no fee for such registration and the Commissioner is authorized to revoke, suspend or cancel such registration after notice and hearing for any violation of this Act or any rule or registration promulgated hereunder.

INSPECTIONS

SECTION 17. The Commissioner, himself or through his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner in such manner as to accurately show the origin and disposition of each type of flue-cured leaf tobacco.

CERTIFIED WEIGHERS

SECTION 18. It shall be the duty of each licensee to provide a certified public weigher for the weighing of tobacco upon his premises and it shall be unlawful for any person to weigh tobacco for sale who is not a certified public weigher.

ENFORCEMENT OF ACT

SECTION 19. It shall be the duty of the Commissioner to enforce the provisions of this Act and to utilize any employee of the Department of Agriculture in the performance of his duties

hereunder. The Commissioner is authorized to revoke or suspend any license or registration issued hereunder after notice and hearing before the Commissioner.

INJUNCTIONS

SECTION 20. In addition to the remedies provided herein and notwithstanding the existence of any other remedy of law and notwithstanding the pendency of any criminal prosecution, the Commissioner is authorized to apply to the Superior Court and such Court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate any of the provisions of this Act or for the failure or refusal to comply with the provisions of this Act or any rule or regulation promulgated hereunder. Such injunction shall be issued without bond.

RULES

SECTION 21. (a) Prior to adoption or change of any rules and regulations, the Commissioner shall promulgate the proposed promulgation or change and afford interested persons an opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule and regulation of the Commissioner who believes that the Commissioner in the promulgation or enforcement of such rule or regulation has exceeded the authority vested in him by the General Assembly under the Constitution of Georgia or United States shall have the right to petition the Commissioner for the repeal or rejection of such rule or regulation by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional.

The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within thirty (30) days, and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within thirty (30) days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy and every person affected by any rule or regulation or any Act of the Commissioner is required to exhaust this remedy before taking any other steps.

(c) All hearings before the Commissioner shall be stenographically reported and shall be available to any interested party upon payment of the stenographic cost.

REVIEW

SECTION 22. (a) *Procedure.*—(1) Any person aggrieved by a final decision or determination in any matter in which a hearing is required or authorized by this Act or by the State or Federal Constitution is entitled to judicial review thereof, provided that the judicial review herein afforded shall be exclusive judicial remedy for review of such decision or determination.

(2) Proceedings for review shall be instituted by filing a petition in the superior court of the county in which the Commissioner resides, within thirty (30) days after service of the final decision or determination of the Commissioner. Copies of the peition shall be served upon the Commissioner and all other parties of record. The court in its discretion may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the Commissioner's decision;

but the Commission may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within thirty (30) days after service of the petition, or within such further time as the court may allow, the Commissioner shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding; the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the Commissioner, the court may order that the additional evidence be taken before the Commissioner upon such conditions as the court may deem proper. The Commissioner may modify his findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modification or new findings or decision.

(b) *Scope of review.*—(1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the Commissioner, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(2) The court may affirm the decision of the Commissioner or remand the case for further

proceedings before the Commissioner; or it may reverse or modify the decision or compel action unlawfully withheld, if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the Commissioner or affected by other error of law; or

(c) made upon unlawful procedure; or

(d) unsupported by substantial evidence as weighed in view of the entire record as submitted; or

(e) arbitrary or capricious.

(c) *Appeals procedure.*—An aggrieved party may secure a review of any final judgment of the superior court under this Act by writ of error to the appropriate appellate court.

SUSPENSION OF LICENSES

SECTION 23. At such time as the Commissioner deems there has been a violation of this Act and the rules and regulations promulgated hereunder, he shall have the power and authority to suspend the license or registration pending investigation of such violation and until such time as the violation has been corrected to the satisfaction of the Commissioner. During the period of time of any investigation of a violation, the Commissioner shall have the power and authority to impound all books and records and to preserve and maintain evidence until investigation is completed. Provided, however, that the investigation shall be completed at the earliest practicable time.

CODE CHAPTER 111–2 REPEALED

SECTION 24. Code Chapter 111–2, relating to statistics on leaf tobacco is hereby repealed in its entirety.

1935 ACT REPEALED

SECTION 25. An Act approved March 28, 1935 (Ga. L. 1935, p. 476), fixing a maximum charge for selling and handling leaf tobacco is hereby repealed in its entirety.

1955 ACT REPEALED

SECTION 26. An Act approved March 9, 1955 (Ga. L. 1955, p. 589), relating to the sale of flue-cured leaf tobacco is hereby repealed in its entirety.

CRIMES

SECTION 27. Any person who shall violate any provision of this Act for which no specific punishment is provided herein shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

SECTION 28. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 7, 1960.

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No. 42

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.
(No. 687, October Term, 1960.)

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, INC., Intervenor,
Appellants,
v.
WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

MOTION FOR REHEARING.

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Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

MOTION FOR REHEARING.

The Appellants herewith submit their Motion for Rehearing based on the following grounds:

1. The court overlooked the material contention of appellants that appellees did not have standing to raise the constitutional question.

2. **The decision as stated in the majority opinion is basically erroneous.**

3. **Even if 1 and 2 are without substance, appellants require a clarification and limitation of the judgment below which is affirmed by order of this court.**

ARGUMENT AND SUPPORT.

1. The court overlooked the material contention of appellants that appellees did not have standing to raise the constitutional question.

We call to the Court's attention that one of the questions argued in the Brief and upon oral argument was whether or not Appellees had standing to raise the constitutional issue, since, as appears from the record, no one was before the Court whose rights were derivative of and dependent upon the Federal Statute, the existence of which, it was contended, deprived the State of Georgia from legislating as it did.

In the closing portion of Appellants' Brief, the attention of the Court was called to the decision of **United States v. Raines**, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519, which opinion renewed basic positions of this Court on when and to what extent constitutional questions would be determined. In view of our contention that the majority opinion is erroneous and in view of our request for clarification, should that opinion be adhered to, we do no more than call the Court's attention to the fact that this question has not been determined.

2. The decision as stated in the majority opinion is basically erroneous.

The judgment of this Court is an unconditional affirmance of the judgment of the Court below. That judgment, in addition to enjoining the enforcement of the particular Act in question, also prevents the State of Georgia from taking **any** action relative to the identification of tobacco, whether or not "typed" as provided in, and whether or not sold on a market which is "designated" and subject to, the Federal Tobacco Inspection Act. The judgment below provides:

". . . the defendants and their successors in office and all others acting in behalf of them or either of them are hereby perpetually and permanently enjoined and restrained . . . from enforcing, or attempting to enforce, by direct or indirect, or other means, on **any** tobacco market in Georgia, **any** method, plan or device which identifies or tends to identify tobacco offered for sale as to its geographical origin, or which, in **any** manner distinguishes or differentiates between tobacco having its origin in Georgia, Florida or Alabama on the one hand or in South Carolina or North Carolina on the other hand; and from making or requiring **any** distinction or differentiation on the tobacco markets between separate lots of tobacco by reason of **any geographic origin or place of growing.**" (Emphasis supplied.)

If this opinion is permitted to stand, it could (a) remove completely the police power of this State relative to agricultural products in general or (b) prohibit the State of Georgia from exercising its full police power relative to tobacco in particular.

The Court in the majority opinion determines at the outset that:

> "(It does not) have here the question whether Georgia's law conflicts with the Federal law." (First sentence, paragraph 11, of the Opinion.)

We start then with the position of the Court, through the majority, supported vigorously by the minority, that there is no conflict between the definition contained in the Georgia Statute as to "type" and the "official standard" of the United States concerning "type." But the Court determines the case on the question of "preemption" and concludes that Congress "in legislating concerning the **type** of tobacco sold at auction preempted the field and left no room for any supplementary state regulation con-

cerning those same **types.**" (Emphasis supplied.) (Majority Opinion, first full sentence on page 4.)

In support of that conclusion, the Court then proceeds to demonstrate the intention to preempt based upon congressional pronouncement by committee report and individual statements relative to the importance of "grade." And, insofar as the Court bolsters its decision by discussion or pronouncement concerning preemption, as opposed to conflict, the Court contents itself in relying on those pronouncements concerning **grade.**

In addition to those sections of the Federal Tobacco Inspection Act alluded to in the Opinion of the minority, we call to the Court's attention the following sections of that Act which not only do not support the conclusion of **intent** to preempt, but affirmatively demonstrate the **intent** of **Congress not to preempt.**

(1) Section 511d, the last sentence, reads: "Nothing contained in this chapter shall be construed to prevent transactions in tobacco at markets not designated by the Secretary or at designated markets where the Secretary has suspended the requirement of inspection or to authorize the Secretary to close any market." So, too, the Secretary at nondesignated markets may not "type," grade or label; may not establish "official standards"; and may not even close markets which have been designated.

(2) Section 511e, the last paragraph of which reads: "This section is intended merely to provide for the furnishing of services upon request of the owner or other person financially interested in tobacco to be sampled, inspected or weighed and **which shall not be construed otherwise.**" (Emphasis supplied.)

It is important to note that this is the section pursuant to which the Secretary is authorized to inspect in order to determine those things which Congress deemed important

to determine, and this section as indicated above is limited in its scope and as to its construction, and specifically requires and permits cooperation between Federal and State agencies.

(3) Section 511g of the Act is the section which provides for labeling. That section authorizes the Secretary by regulation to prescribe the form of certification which is referred to throughout the Act and this authority is limited to "the form in which such certification of **grade** shall be shown. . . ." (Emphasis supplied.) This section we deem to be of particular significance since it demonstrates that in the field of identification, which field is the area specially intended by the Georgia Act to be occupied, Congress concerned itself and contented itself only with identification as to **grade** and neither permitted nor required, for identification purposes, any limitation as to "type."

(4) Section 511i concerns itself with those things which Congress thought it was important to make criminal offenses, so as to add additional deterrent to those who would invade the prerogatives of the Federal Government, by making those invasions crimes. Congress limited its pronouncements in this field (and by implication permits where not limited) to the following:

(a) The use of the words "United States," "Government," "Federal," relating to the **grade** of tobacco;

(b) 511i (c) prohibits "a certificate or report stating the **type**, grade, size or condition or any lot of tobacco to be in accordance with the standards of the United States . . . **unless** such certificate states in prominent letters in its heading that it is not issued under the authority of the United States." (Emphasis supplied.) No clearer

declaration on the part of Congress could exist that another, including the State, may identify tobacco in such manner even according to type and even according to grade if it sees fit provided **only** that it is disclosed that such is not an "official standard" of the United States.

(c) 511i (e). The proviso reads: "Nothing herein shall operate to prevent the owner of tobacco from appealing or protesting in accordance with regulations of the Secretary the grade certified for his tobacco." If the certification as to type was deemed by Congress to be important enough to be exclusive, and to preempt, would Congress preclude an appeal to the Secretary concerning "type"?

(d) 511i (g). This section makes it a crime only to tamper with certification concerning grade. It does not mention "type."

(e) 511i (m). This section provides for cooperation with the Secretary and any State. If absolute preemption, which is the thread of the majority opinion, was the result of the Act, the Secretary would need no power to cooperate but would be, as is contended and to this point upheld, all powerful.

Those sections demonstrate beyond question that there is no **intent** on the part of Congress to preempt relative to "type," most especially in the field of generic identification as opposed to identification according to quality (grades).

Thus, to support the majority opinion, preemption must be said to result from regulations of the Secretary wherein he prescribes by regulation (although not followed by practice) that classification by type shall be placed on the inspection certification (7 C. F. C., §§ 29.80, 29.1144). In the first instance, Section 511g shows any such regula-

tion to be beyond the scope of the Secretary's power. In the second instance, the Secretary himself, according to the record in this case, does not adhere to that regulation. And in the third and most important place, we know of no rule under which the **intent of Congress** can be demonstrated by regulation of the Executive Branch, particularly where the Executive Branch itself does not adhere to wn regulation.

e are driven thus to the conclusion based upon the words emphasized in the course of the opinion, e. g., "Regardless of any factors of historical or geographic nature"; "principally"; and on the concluding sentence of the next to last paragraph: "Tobacco is includable in Type 14 regardless as to where it has been grown, provided it meets the specifications of that type," that the Court finds the Georgia definition to be in **conflict.** If this be the case, we could not quarrel with the opinion provided the Court did demonstrate how there can be conflict in the face of the stipulation and in the face of the official publication which demonstrates "type" and which was issued pursuant to Section 511c of the Act (Stipulation 4 and Defendant's Exhibit 1).

If then we do not have a congressional expression of preemption, a congressional intent of preemption, or conflict, do we have a new rule of law that congressional action in the field mechanically precludes State action? If this be the new rule, that congressional intent—clear—manifest, be no longer the test, the States, with reference to agricultural products alone will have stripped from their power to regulate relative to most all of its products, regardless of its importance.

If this opinion is permitted to stand with the announcement and adoption of the mechanical rule, what will be the status of state legislation and regulation as to:

Apples, in view of, 28 U. S. C. A. 20-23;
Filled Milk, in view of, 28 U. S. C. A., Ch. 3;

Animals, Meat and Meat Products, in view of, 28 U. S. C. A., Ch. 4;
Diseased Animals, in view of, 28 U. S. C. A. 104;
Animal Remedies, in view of, 28 U. S. C. A., Ch. 5;
Foods and Drugs, in view of, 28 U. S. C. A., Ch. 9;
Poultry and Poultry Products Inspection, in view of, 28 U. S. C. A., Ch. 10;
Cotton Standards, in view of, 7 U. S. C. A., Ch. 2;
Grain Standards, in view of, 7 U. S. C. A., Ch. 3;
Naval Stores, in view of, 7 U. S. C. A., Ch. 4;
Seed, in view of, 7 U. S. C. A., Ch. 5;
Insecticides, in view of, 7 U. S. C. A., Ch. 7;
Dealing in Livestock, in view of, 7 U. S. C. A., Ch. 9;
Warehouses, in view of, 7 U. S. C. A., Ch. 10;

and throughout the 40 chapters enumerated in Title 7, U. S. C. A., and every instance where there is Federal and State legislation concerning a commodity or business?

Is this Court, by this decision, saying that federal action must specifically and unequivocally state by Congress, that the several states are permitted to act? If this be so, do we not have a radical departure from adherence to the time-honored rule of permitting and upholding the right of the state to exercise its police power whenever possible?

More importantly, the Congress of the United States needs to know if its action in a field, absent an expression to the contrary, precludes state action, for certainly the collective desires of the Representatives and Senators to protect the products of their own respective states would evidence itself in continuous expressions that United States Grade A eggs will not preclude eggs from being called United States Grade A Iowa eggs or United States No. 1 California oranges or United States No. 1 Idaho potatoes.

Finally, the majority opinion concludes:

> "Under the definition of types or grades of tobacco **and the labeling** which the Federal government has adopted, complementary State regulation is as fatal as State regulations which conflict with the Federal scheme." (Emphasis supplied.)

The only "complementary State regulation" is labeling as to "type." The Federal government (Sec. 511g) demonstrates the absence of any requirement of any "labeling" by the Federal government in any area save as to **grade**. Since Georgia does not label as to grade, the necessary requisite for the Court's majority opinion as to preemption is missing.

The extent of State action in this case is emphasized by the Georgia Tobacco Inspection Act in two instances. Section 1 provides:

> "Section 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. . . ."

Section 13, after providing the means of identification, provides:

> "(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to in-

dicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State."

A mere reading of the quoted provisions of the Georgia Act is enlightening.

3. Even if 1 and 2 are without substance, appellants require a clarification and limitation of the judgment below which is affirmed by order of this court.

If this opinion is permitted to stand by an unconditional affirmance of the judgment of the lower Court, the Commissioner of Agriculture of the State of Georgia, in the field of identification and relative to markets covered by the Federal Inspection Act, would be absolutely prohibited from attempting to exercise the police power of this State to guarantee to the purchasers of tobacco that the products that they were seeking are correctly and properly identified. If this opinion is permitted to stand, the Commissioner of Agriculture could not ask the legislature for additional legislation, outside typing, to require the proper identification of the origin of tobacco. This clarification is not important relative to tobacco alone, but this injunction in its present form goes to the natural right of any State or locale having a product of which it is proud to be able to enhance the product in the market place by requiring that those who deal therein do so with full disclosure; that those who purchase may purchase with full confidence that the desirable product which they sought is that which they purchased and, whether it be California oranges, Idaho potatoes or Georgia tobacco, when it is important to the economies of that State, that State has the right to exercise the full force of its police power to require that it be identified that it meet the standards of the State in order to bear the label of the State. Whether that identification be in terms of white or blue or other tag, ready identification as to the

source is demonstrated by this record to be absolutely essential to the welfare of the producers of tobacco in this State.

We respectfully request therefore that this Court, even if it refuses the Motion for Rehearing advanced above, direct that the judgment of the lower Court be modified so that the Commissioner of Agriculture of the State of Georgia is enjoined only from classifying tobacco as to "type" or grade and is permitted to identify in such manner as he may prescribe by lawful regulation so long as that identification does not tend to establish a contrary "official standard" from that established pursuant to the Federal Tobacco Inspection Act.

Respectfully submitted,

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I hereby certify that the foregoing Motion for Rehearing is presented in good faith and not for delay.

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